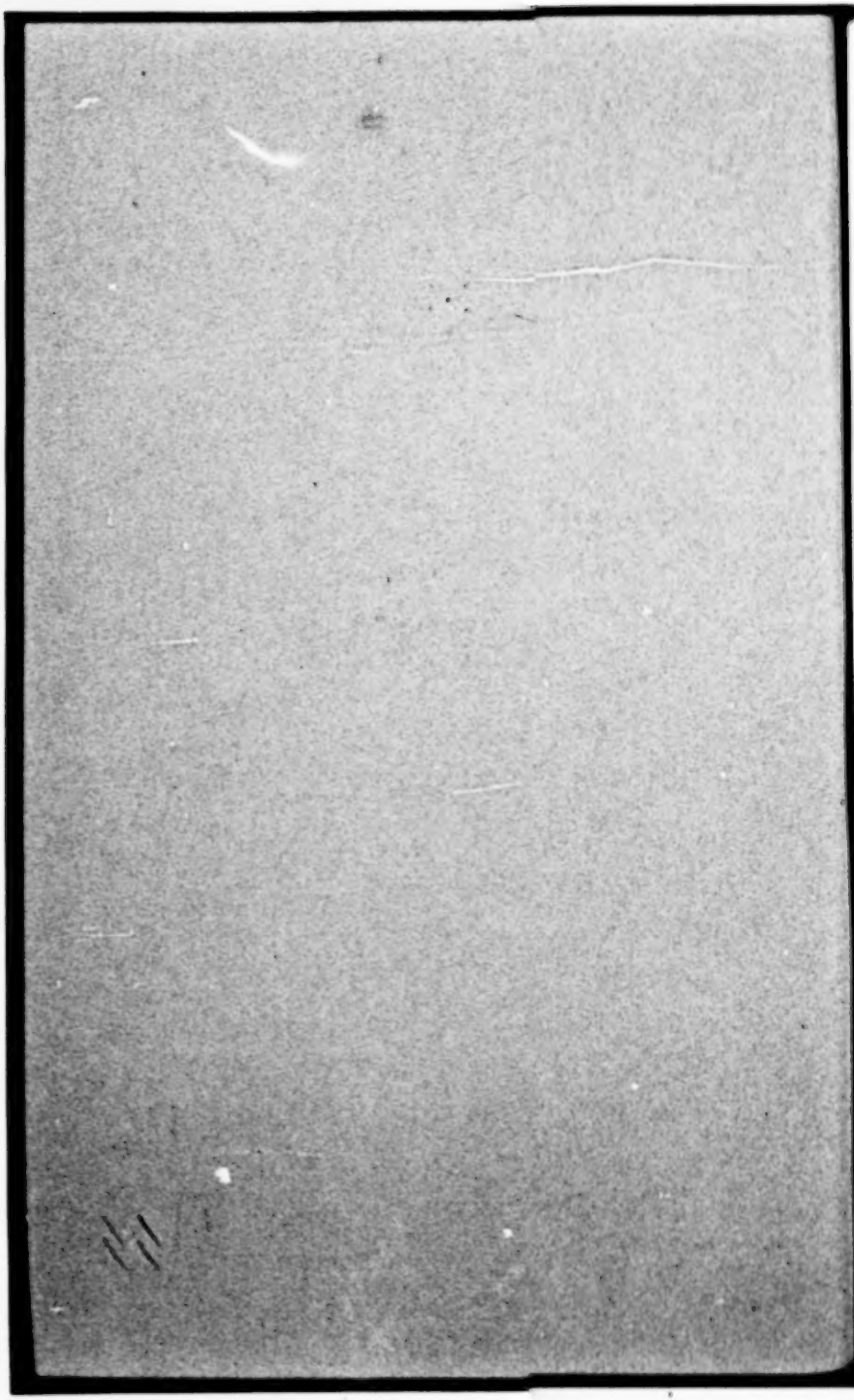

Appendix "A"

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is officially reported in 164 Ohio State 529, 133 N. E. 2d 104. A copy of the opinion is attached as Appendix "A."

APPENDIX "A"

IN THE
SUPREME COURT OF OHIO

Nos. 34311, 34361

THE STATE OF OHIO,
Appellee,

v.

MORGAN,
Appellant.

THE STATE OF OHIO,
Appellee,

v.

RALEY, et al.,
Appellants.

SYLLABUS BY THE COURT

(February 23, 1956)

1. A commission created by statute, which is authorized to function after sine die adjournment of the General Assembly and which is composed solely of members of the General Assembly, impersonally described, and whose des-

ignated function is to investigate subversive activities and "to recommend such additional legislation or revision of existing laws as may seem advisable and necessary" to the next General Assembly, is within the creating powers of the General Assembly under Section 8, Article II of the Constitution of Ohio, authorizing that body to obtain through committees or otherwise information affecting prospective legislation, is within the term, "committee," as used in that article, possesses all the attributes of a "select committee" of the General Assembly, and is, in fact, a "select committee" thereof within the purview of Section 12845, General Code, Section 2917.42, Revised Code.

2. The General Assembly and its committees have a right to the testimony, pertinent to the matter under inquiry, of each and every citizen of this state in order to obtain information affecting legislative action under consideration or in contemplation, and each citizen has a corresponding duty to give such testimony, subject only to the protection afforded him by the Constitution and by statute.

3. A witness appearing before a committee of the General Assembly, who objects to a propounded question, the objection being in language which the committee might reasonably be expected to understand as an attempt to invoke the rule of privilege against self-incrimination, thereby invokes any protection against self-incrimination to which he may be entitled under the Constitution of Ohio, regardless of whether the witness' reference is to it or to the Constitution of the United States.

4. Immunity from prosecution pertains solely to a prosecution in the same jurisdiction, and where the immunity is full and sufficient within the state it affords the protection against compulsory self-incrimination guaranteed by the state Constitution and supplants the rule of privilege based thereon.

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5. Where there is statutory immunity granted the witness, which affords him as much protection against self-incrimination as that to which he is entitled by the constitutional provision against self-incrimination, there devolves upon the witness a clear duty to give his testimony free of a refusal to answer based upon the rule of privilege arising from the constitutional provision; and the protection against self-incrimination afforded by the Constitution is not abrogated in any manner by a statute setting out a penalty for a breach of this duty.

6. Where a witness has a duty to give testimony free of a refusal to answer on the ground of self-incrimination by a statutory grant of full and sufficient immunity from prosecution, and where it is made a crime to refuse to answer questions pertinent to the matter under inquiry, and where the witness refuses to answer on that ground, he is guilty of a violation of the criminal statute regardless of whether he is subsequently directed to answer.

In cause No. 34311, appellant Anna H. Morgan, hereinafter called appellant, pursuant to subpoena, appeared before the Ohio Un-American Activities Commission at a hearing held by it in Columbus, Ohio, on April 1, 1952.

After being sworn, appellant refused to answer substantially each and every question propounded to her, "under the Fifth Amendment of the Constitution, because to do so would give your committee an opportunity to incriminate me."

Subsequently, on May 21, 1952, appellant was indicted under Section 12845, General Code, Section 2917.42, Revised Code, for her refusal to answer 37 of the questions so propounded.

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Her demurrer to the indictment, filed October 25, 1952, having been overruled, appellant, in writing, waived her right to trial by jury, and the cause was tried before a judge of the Common Pleas Court of Franklin County on November 16, 1953.

At the trial the state called as witnesses Gordon Renner, Samuel L. Devine and Edwin H. Hammock.

The first two witnesses are attorneys at law who were members of the 99th General Assembly and the Ohio Un-American Activities Commission, Renner being the elected chairman and Devine the elected secretary thereof, and both were present at the hearing at which appellant appeared.

Hammock is a court stenographer who was employed by the commission and who recorded the hearing out of which the indictment and trial here under consideration arose.

These witnesses were, of course, subjected to cross-examination. Other than this, however, there was neither testimony nor evidence offered by appellant, she apparently being content to rely upon the validity of either her earlier attack upon jurisdiction by demurrer or her motion for a directed verdict of acquittal duly made at the close of the trial.

The only item of physical evidence in the record is a copy of a subpoena which purports to be a copy of the subpoena duly served upon appellant and by virtue of which she appeared before the commission. It was introduced by the state and its validity is not questioned.

The trial court sustained appellant's motion for a directed verdict of acquittal upon five counts of the indictment, finding that the questions therein included were either not pertinent to the matter under inquiry by the commis-

sion or were repetitious of other questions as to the indictment, overruled said motion with respect to the remaining counts, found appellant guilty thereon and imposed sentence.

The Court of Appeals for Franklin County affirmed the judgment of the trial court, and the cause is before this court both as an appeal of right and by the allowance of appellant's motion to certify the record.

In cause No. 34361, appellants Raley, Stern and Brown, hereinafter called defendants, pursuant to subpoena, appeared before the Ohio Un-American Activities Commission at a hearing held by it in Cincinnati, Ohio, on October 20, 1952.

Upon the refusal of each to answer certain questions propounded to him, on the ground that to do so might tend to incriminate him, the commission, in compliance with the provisions of Section 76-32, General Code, Section 103.35, Revised Code, caused proceedings in contempt to be prosecuted in the Common Pleas Court of Hamilton County.

Separate indictments were returned by the Grand Jury of Hamilton County, charging defendants with specified violations of Section 12137, General Code, Section 2705.02, Revised Code.

By agreement defendants were tried together before a judge of the Court of Common Pleas, after having individually waived in writing the right to trial by jury.

The trial court found each defendant guilty of contempt as charged in all counts of each indictment, and proceeded to impose sentence.

On appeal to the Court of Appeals for Hamilton County, the causes were consolidated, and that court affirmed in part and reversed in part the judgments of the trial court; and the cause is before this court both as an

appeal of right and by the allowance of a motion to certify the record.

Ann Fagan Ginger, Brooklyn, N. Y., and Thelma C. Furry, Akron, for appellant in cause No. 34311.

Louis C. Capelle, Morse Johnson, Milton H. Schmidt and Chester R. Shook, Cincinnati, for appellants in cause No. 34361.

Frank H. Kearns, Prosecuting Attorney, Lawrence A. Ramey and Earl W. Allison, Columbus, for appellee in cause No. 34311.

C. Watson Hover, Prosecuting Attorney, and Carl B. Rubin, Cincinnati, for appellee in cause No. 34361.

MATTHIAS, Judge.

These cases involve not only the appeal of Anna H. Morgan (cause No. 34311), but also the appeal of Talmadge Raley, Joseph Stern and Emmet Calvin Brown (cause No. 34361).

Since the questions raised in each are similar except in one significant respect, the following reasoning and conclusions, written with specific reference to and upon the facts of the Morgan appeal, apply with equal force to the appeal of Raley, Stern and Brown.

From the numerous errors assigned by appellant, the issues raised which are determinative of the case concern:

I. The jurisdiction of the trial court to hear the cause and impose sentence, dependent upon whether appellant appeared before a body which was legally constituted and of which she could be held in contempt and whether such body brought the action in an appropriate manner.

II. Whether appellant by refusing "under the Fifth Amendment" to answer questions sufficiently indicated her intention to invoke whatever rule of privilege regarding self-incrimination to which she was entitled under the Constitution of Ohio.

III. Whether such rule of privilege, if sufficiently invoked, was in fact available to her in view of the Ohio immunity statute.

IV. The necessity of a direction to answer, after each refusal on the ground of self-incrimination, to sustain a finding of contempt.

These matters will be considered in the above order.

I

Appellant attacked the jurisdiction of the trial court to hear this cause and impose sentence, by attacking the indictment upon demurrer. The jurisdictional questions raised by the demurrer and saved by appellant's assignment of errors to this court are essentially twofold:

A. Was the Ohio Un-American Activities Commission a legally constituted body having the power to compel the attendance and testimony of witnesses on April 1, 1952, which was after sine die adjournment of the General Assembly which created it?

B. If the commission was a legally constituted body, was it a select committee of the General Assembly authorized to prefer charges of contempt under Section 12845, General Code, Section 2917.42, Revised Code, and if so was it precluded from using this remedy by the provisions of Section 76-32, General Code, Section 103.35, Revised Code?

A.

[1] The power of the General Assembly to create investigative bodies is a necessary incident to its power to legislate and to the correlative power to secure sufficient information to enable it to legislate intelligently and independently.

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This power is granted, as follows, to the General Assembly by Section 8, Article II of the Constitution of Ohio:

> "Each house . . . shall have all powers, necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under consideration or in contemplation, . . . and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers."

It is seen that the General Assembly is granted by the people of Ohio the power to obtain information affecting legislation under consideration or in contemplation by the use to *committees or otherwise.*

This court considered an example of a method "otherwise" than "through committees" of obtaining information for legislative purposes in the case of *State ex rel. Herbert* v. *Ferguson,* 142 Ohio St. 496, 52 N. E. 2d 980, 981.

That case concerned the constitutionality of the Post-war Program Commission which was established by a special act of the 95th General Assembly. It was composed of a specified number of members of the General Assembly, impersonally described, and certain others who were not members of the General Assembly, and its purpose was essentially to make investigations and to report its recommendations based thereon to the Governor and the General Assembly on or before January 15, 1945, *which was after the next General Assembly,* the 96th, *convened.*

The court, in the fifth paragraph of the syllabus, found:

> "A commission composed of members of the General Assembly and others to make investigation of and recommendations on important matters of legislative concern, is within the creative powers of the General

Assembly under Section 8, Article II of the Constitution, authorizing that body to obtain through committees or otherwise information affecting prospective legislation."

[2] Thus, this court has recognized that Section 8, Article II, empowers the General Assembly to create a commission for investigative purposes which shall function after sine die adjournment and make recommendations to the next General Assembly.

We hereby approve that finding. See, also, 49 American Jurisprudence, 258, States, Territories, and Dependencies, Section 41, and cases cited.

It is important to note here that such a commission, when recognized as authorized by Section 8, Article II, may be given the means of exercising the correlative power, expressly granted in this section of the Constitution, to "enforce the attendance and testimony of witnesses, and the production of books and papers."

[3] It is clear, then, that the General Assembly has the power to create an investigative body which is authorized to function after sine die adjournment, and that it validly exercised this power in creating the Ohio Un-American Activities Commission by statute.

B.

Appellant was indicted, tried and convicted for violating the provisions of Section 12845, General Code, Section 2917.42, Revised Code, which is as follows:

"Whoever, having been subpoenaed or ordered to appear before either branch of the general assembly, or before a standing or select committee of the general assembly, or either branch thereof, fails so to do, or, having appeared, refuses to answer a question perti-

> nent to the matter under inquiry, or to produce, upon reasonable notice, books, papers or documents in his possession or under his control, pertinent thereto, shall be fined not less than one hundred dollars nor more than five thousand dollars."

[4] Whether a body created by the General Assembly is a select committee within the meaning of this section is determined by the purpose and functions for which such body was created as indicated in the resolution or act of the General Assembly establishing it. The name of such body is not controlling in the absence of a specific definition thereof in the creating statute or resolution.

In considering the constitutionality of the act creating the Post-war Program Commission in the *Ferguson* case, supra, this court discussed the *function* of the body created by the General Assembly.

Determining that the General Assembly had not, by delegating sovereign powers to the program commission, created civil offices which members of that Legislature would be forbidden to hold by virtue of Section 19, Article II of the Constitution, which prohibits the appointment of members of the General Assembly to any civil office created during their terms of office, the court said:

> "The act involved establishes a commission, the described functions of which, for the most part, consist of finding facts, assisting in the formulation of plans and the making of recommendations. Surely this cannot be said to constitute the exercise of sovereign powers."

Similarly, the act with which we are concerned established a commission, the described functions of which consist of finding facts and making recommendations.

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We have described the Post-war Program Commission as an example of the use of the legislative investigative powers conferred by Section 8, Article II, which method is "otherwise" than "through committees."

Since the body created by the act establishing the Post-war Program Commission included members other than legislators, it could not definitely be called a "committee" within the purview of the use of that word in Section 8, Article II, which must be held to refer only to committees composed solely of members of the General Assembly.

Where, however, a body is created by the General Assembly, by statute, which is composed solely of members of the General Assembly, impersonally described, and whose duties are to investigate subversive activities and "to recommend such additional legislation or revision of existing laws as may seem advisable and necessary," it is a "committee" of the General Assembly under Section 8, Article II of the Constitution, and is a select committee thereof within the purview of Section 12845, General Code, Section 2917.42, Revised Code, having the power to cause the prosecution of a witness for contempt under that section.

Appellant contends that, even though this be so, Section 76-32, General Code, Section 103.35, Revised Code, provides an exclusive remedy to be used by this particular body, thus precluding the application of Section 12845, supra.

Section 76-32, General Code, Section 103.35, Revised Code, provides, in part:

> "... on the refusal of any person or officer to testify to any matters regarding which he may be lawfully interrogated ... the chairman may be authorized by a majority of the members sitting at the time the alleged offense is committed, to cause a proceeding for

contempt to be filed and prosecuted in the common pleas court of any county under the provisions of sections 12138 to 12146, inclusive, of the General Code."

The General Assembly chose the phrase, "may be authorized," rather than the phrase, "shall be authorized" or "must be authorized," in authorizing proceedings under Sections 12138 to 12146, General Code. It is presumed it had a reason for so choosing.

[5] "The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. . . . a provision couched in permissive terms is generally regarded as directory or discretionary. This is true of the word, 'may'...." 50 American Jurisprudence, 49, Statutes, Section 28, and cases cited.

It is seen that this statute by its own terms simply gives the commission a procedure for instituting a contempt proceeding under Sections 12137 to 12146, General Code, which it may use at its discretion.

[6] The fact that the Legislature has endowed a particular committee with a *permissive* procedure for punishing witnesses for contempt, which is other than the procedure it has given all like bodies, neither excludes the operation of such usual procedure nor precludes its use by any standing or select committee.

However different it might be if the permissive statute were mandatory, the fact remains, from what has been said, that the Ohio Un-American Activities Commission had the power to cause appellant to be indicted and prosecuted under the provisions of Section 12845, General Code, Section 2917.42, Revised Code.

Since the commission, in this case, chose to institute proceedings under a statute providing other than the per-

missive procedure given it, the validity of such permissive procedure is not here before the court. The procedure chosen is unassailable.

II

We must consider next whether the language used by appellant in giving her reason for refusing to answer was sufficient to invoke any rule of privilege arising from the provisions guaranteeing protection from compulsory self-incrimination embodied in the Constitution of Ohio.

The record discloses that at the time of the hearing appellant, after having been interrogated and having stated her name, refused to answer, in the following words, the question, "Where do you reside, Mrs. Morgan?":

> "I regret that I cannot answer your question under the Fifth Amendment of the Constitution, because to do so would give your committee an opportunity to incriminate me."

After this she continued to refuse, "under the Fifth Amendment," to answer questions.

The state argues that by the use of this terminology the witness failed to invoke the only constitutional protection pertaining to self-incrimination available to her while appearing before a committee of the General Assembly, to wit, that provided by Section 10, Article I of the Constitution of Ohio.

[7] This argument is based upon the well known doctrine which this court restated in the case of *State* v. *Lindway*, 131 Ohio St. 166, 2 N. E. 2d 490, 491, as follows:

"The . . . Fifth [Amendment] to the Constitution of the United States, prohibiting . . . compulsory self-incrimination [is] directed exclusively against the activities of the

federal government and [has] no application to the various states and their agencies." See, also, *Feldman* v. *United States*, 322 U. S. 487, 490, 64 S. Ct. 1082, 88 L. Ed. 1408, 154 A. L. R. 982, and cases therein cited.

However, in the case of *Quinn* v. *United States*, 349 U. S. 155, 75 S. Ct. 668, 671, 99 L. Ed. 964, the Supreme Court of the United States, considering whether a witness called before a subcommittee of the Committee on Un-American Activities of the House of Representatives, who refused to answer, basing his refusal upon the refusal by a former witness to the effect of a declination to answer under the "'first and fifth Amendments'" and the "'first amendment to the Constitution, supplemented by the fifth amendment,'" had sufficiently claimed the privilege, said:

> "It is agreed by all that a claim of the privilege does not require any special combination of words. . . . If an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected both by the committee and by a court. . . ."

[8] We are in complete accord with that conclusion and with the reasoning which supports it and conclude that a witness appearing before an investigating committee of a state Legislature, who objects to a question, the objection being in language which the committee may be reasonably expected to understand as an attempt to invoke the rule of privilege against self-incrimination, whether it be by an appeal to the federal Constitution or to a state constitution, has thereby invoked any protection against self-incrimination to which he may be entitled under either instrument.

It follows that appellant sufficiently indicated her invocation of any rule of privilege to which she was entitled

under the protection against self-incrimination afforded her by Section 10, Article I of the Constitution of Ohio.

III

The above finding leads us to the next question raised by this appeal. We must decide whether the immunity granted a witness appearing before a select committee of the General Assembly by Section 60, General Code, Section 101.44, Revised Code, is so full and sufficient as to supplant the protection provided by the rule that testimony is legally privileged where it might subsequently be used against the witness in a criminal prosecution, which rule is based on the provision of Section 10, Article I of the Constitution of Ohio, providing that "No person shall be compelled, in any criminal case, to be a witness against himself."

Section 60, General Code, Section 101.44, Revised Code, provides, in part:

> ". . . the testimony of a witness examined before a committee or sub-committee shall not be used as evidence in a criminal proceeding against him, *nor shall a person be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing, concerning which he so testifies. . . .*" (Emphasis ours.)

Although the provisions of this section of the Code have never been construed by this court, the case of *Mouser* v. *Public Utilities Commission*, 124 Ohio St. 425, 179 N. E. 133, considered the provisions of Section 553, General Code, which are similar in wording and intent. The hearings in the *Mouser* case were held by the Public Utilities Commission of Ohio.

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Section 553 provided, in part:

> "A person shall not be excused from testifying . . . in a proceeding based upon or growing out of violation of the provisions of this chapter, on the ground that the testimony . . . may tend to incriminate him . . . *but no person having so testified shall be prosecuted or subjected to a penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may have testified. . . .*" (Emphasis ours.)

The similarity of the italicized portions of these two statutes is obvious.

In the *Mouser* case, this court, in construing the immunity provisions of the Public Utilities Act, said:

> "Section 553, General Code, confers upon such witness full and complete immunity by preventing prosecution or subjection to penalties against him 'on account of any transaction, matter or thing concerning which he may have testified.' Since that section affords the witness such absolute immunity, it deprives him of his constitutional right to refuse to answer; and for so refusing he may be punished for contempt."

We find this construction to apply in like manner to the immunity statute here under consideration.

Appellant argues that she is afraid of *federal* prosecution, and that, since the state cannot provide immunity from such prosecution, the state immunity afforded her does not give sufficiently comprehensive protection to deprive her of her constitutional right to refuse to answer.

The question is thus refined to whether a state immunity statute, which is admittedly sufficient to preclude prosecution under the laws of the state but which does not afford immunity from federal prosecution, supplants the right

of a witness, based upon the protection guaranteed by the *state* Constitution, to refuse to answer on the ground of self-incrimination.

In the case of *United States* v. *Murdock*, 284 U. S. 141, 52 S. Ct. 63, 65, 76 L. Ed. 210, 82 A. L. R. 1376, the Supreme Court of the United States said:

> "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, *and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute.* The principle established is that *full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination.*" (Emphasis ours.)

In like manner the Supreme Court later said:

> "The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction." *Feldman* v. *United States*, 322 U. S. 487, 493, 64 S. Ct. 1082, 1085, 88 L. Ed. 1408, 154 A. L. R. 982.

And in the *Feldman* case Mr. Justice Frankfurter, speaking for the majority of the court, quoted Chief Justice Taney in *Ableman* v. *Booth*, 21 How. 506, 516, 16 L. Ed. 169, as follows:

> " 'The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independ-

ently of each other, within their respective spheres. And the sphere of action appropriated to the United States is far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.' "

Thus, the state and national governments are held by the Supreme Court of the United States to be separate sovereignties, and protection by one in granting sufficient immunity within its domain is sufficient to impose upon the witness the duty of testifying without invoking the privilege of self-incrimination, without regard to protection against the other within its separate domain.

Those decisions of the Supreme Court of the United States were occasioned by an attempted use of the rule protecting the individual from being forced to give testimony which might incriminate him. The rule of privilege with which they dealt is based upon the protection afforded the individual by the Fifth Amendment to the Constitution of the United States, which says:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

We have here under consideration an attempted use of the same rule except that in this instance the rule of privilege is based upon the protection afforded by Section 10, Article I of the Constitution of Ohio, which says:

"No person shall be compelled, in any criminal case, to be a witness against himself."

"Where the provisions of the national and state Constitutions on any subject are identical, the state courts usually acquiesce in the decisions of the national courts interpreting and applying such pro-

visions. . . ." 11 American Jurisprudence, 741, Constitutional Law, Section 105, and cases cited.

[9] We find no valid reason for disagreeing with the interpretations and applications by the Supreme Court of the United States, as hereinbefore set out, and conclude that the inability of the state of Ohio to provide immunity from possible federal prosecution does not defeat the immunity statute here under consideration, which grants complete immunity from prosecution by the state.

[10] It follows that the immunity from prosecution by the state of Ohio concerning any of the matters to which appellant might have testified afforded her as much protection from self-incrimination as the Constitution of Ohio guarantees, and her refusal to answer on the basis that she might incriminate herself was an attempted invocation of a rule of privilege which, by virtue of the immunity granted, was unavailable to her.

IV

Appellant argues that she could not have been guilty of contempt before the Ohio Un-American Activities Commission in view of the fact that the committee did not, upon each refusal to answer, specifically direct her to answer, and that such direction was necessary in order to show contumaciousness on her part.

The question presented is whether a witness appearing before an investigating committee of the General Assembly, who refuses to answer a question *on the ground that to do so would be self-incriminating*, must be directed, after such refusal, to answer in order to be found guilty of contempt by a violation of Section 12845, General Code, Section 2917.42, Revised Code, which is a criminal statute.

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This section, set out in full supra, reads in part:

> "Whoever . . . refuses to answer a question pertinent to the matter under inquiry . . . shall be fined. . . ."

The term, willful, or, deliberate, does not appear in the statute. The only basis for objection to a question propounded by the commission to be seen in the statute is the provision that the question must be "pertinent to the matter under inquiry." Nowhere in the statute can there be read or inferred a requirement that a witness must be directed to answer a question, upon his refusal to so do *on the ground of self-incrimination,* in order to show a violation of the statute.

In the case of *State* v. *Huffman,* 131 Ohio St. 27, 1 N. E. 2d 313, this court, in the first paragraph of the syllabus, held:

> "We have no common-law crimes in Ohio; neither do we have common-law criminal procedure. Consequently, if a statute defining an offense in Ohio provides that it must be committed with a particular intent, such intent becomes a material element of the offense and must be alleged in the indictment and proved on trial. *On the contrary, if a statute defining an offense is silent on the question of intent, it is not necessary to allege and prove an intent to commit the offense.*" (Emphasis added.) See, also, *State* v. *McLean,* 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721; and *State* v. *Zichfeld,* 23 Nev. 304, 46 P. 802, 34 L. R. A. 784.

Section 60, General Code, grants immunity to all witnesses appearing before "a committee or sub-committee" of the General Assembly, or of either house thereof, "except as to a person who, *in writing,* requests permission to appear" or who "*in writing* waives the rights, privileges and immunities granted by this section."

Thus, the immunity granted by this section enveloped appellant like a cloak the instant she was sworn, and required not only an affirmative act on her part but an affirmative act *in writing* in order to be divested.

The basic reason for a direction to answer is to inform the witness that the committee is overruling the objection to the question on the ground of privilege against self-incrimination; that it, in effect, refuses the witness' claim that to answer would tend to incriminate him.

This, of course, presupposes a right of the witness to claim the privilege in the first instance. Here, however, in view of Section 60, there is no need for such protection, which the witness is presumed to know, as the witness is presumed to know that he may be prosecuted, however unsuccessfully, under Section 12845, for *any* refusal to answer. The witness who attempts to invoke the privilege cannot later claim that he was uncertain as to his rights. Appellant was "bound rightly to construe the statute. [Her] mistaken view of the law is no defense." *Sinclair v. United States,* 279 U. S. 263, 299, 49 S. Ct. 268, 274, 73 L. Ed. 692.

[11] Thus, the witness knew or was presumed to know that under the statute her invocation of the rule of privilege against self-incrimination was a useless act under the law, since such rule of privilege had been supplanted by a statute affording her sufficient immunity from prosecution to satisfy the protection against self-incrimination guaranteed by the Constitution. Her mere refusal to answer on such a basis constituted contempt, and the interpolation of such a frivolous objection imposed no duty upon the commission to inform her of what she already knew—that she had no right to refuse to answer on such ground.

It is seen that a direction to answer in such a case would serve no substantial purpose. Although it may be true that

the commission could have informed appellant that she was in contempt and subject to prosecution which might be avoided, at the sound discretion of the commission, if she chose to answer, an answer even at that point would, upon a subsequent trial, go only to show a mitigation of the contempt already committed.

It is axiomatic that neither ignorance of the law nor a mistake in its interpretation affords a valid defense in a criminal prosecution. A witness cannot be heard to say in one breath that he knows enough of the law to claim the privilege against self-incrimination and in the next breath that he knows nothing of the immunity statute, or that he has misconstrued it.

Appellant argues that she refused to answer because she felt she was not afforded such full and complete immunity as to deprive her of the right to refuse on the ground of self-incrimination. Regardless of whether this be interpreted to show a willful and contumacious refusal to answer, it certainly indicates a deliberate refusal to answer under a mistaken interpretation of the law.

It is argued also that the *Quinn* case, supra, is, in effect, a mandate by the Supreme Court of the United States to all legislative bodies, both national and state, that they must specifically direct a witness to answer before he may be cited for contempt, and a directive to all judicial tribunals in the nation that such must be the case before a witness may be convicted of contempt.

An examination of the reasoning behind that decision compared with the reasoning behind the decisions in the instant cases shows such argument to be fallacious.

We are here interpreting the effect of a *state* immunity statute, Section 60, General Code, providing not only that testimony given by a witness shall not be used in a subsequent criminal proceeding but also that the witness shall

not "be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing, concerning which he so testifies"; and we are determining for the first time in regard to this particular statute that such protection is sufficient to supplant the rule of privilege against self-incrimination, i. e., that both the statute and the rule stem from the guaranty of protection from self-incrimination afforded by Section 10, Article I of the Constitution of Ohio, and that the scope of protection afforded by the former is sufficient to supplant the protection afforded by the latter.

This, however, is not the case with the federal immunity statute, Section 3486, Title 18, U. S. Code, which was applicable to the defendant in the *Quinn* case.

The first federal statute regarding the immunity of a congressional witness, Section 859, Revised Statutes, was enacted in 1857 and was almost identical in wording and effect with the first federal immunity statute regarding witnesses appearing before federal judicial tribunals, Section 860, Revised Statutes, which was enacted in 1868.

In 1892, the Supreme Court of the United States, in the case of *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, held that Section 860 did *not* afford sufficient protection to supplant the right of a witness to refuse to answer on the ground of self-incrimination. See *United States* v. *Bryan*, 339 U. S. 323, 335 et seq., 70 S. Ct. 724, 94 L. Ed. 884, for a lucid history of Section 860 and its purpose and effect.

The conclusions set out in the *Counselman* case have never been overruled, and in the *Quinn* case the Supreme Court said [349 U. S. 155, 75 S. Ct. 675]:

> "Clearly not every refusal to answer a question propounded by a congressional committee subjects a wit-

> ness to prosecution under § 192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination —the committee may sustain the objection and abandon the question, even though the objection might actually be without merit."

It is important to note here that the federal immunity statute which was applicable to the defendant in the *Quinn* case, in its original as well as its present form, provides a witness only with protection from *the use of his testimony against him* and not, as is provided by the Ohio statute, with *protection from prosecution* for matters concerning which he testified. For an interpretation of a federal statute very similar in wording to the Ohio statute, which is in complete accord with the conclusions herein reached, see *Brown* v. *Walker*, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819. See, also, *Hale* v. *Henkel*, 201 U. S. 43, 66 et seq., 26 S. Ct. 370, 50 L. Ed. 652.

The point derived from the above is that it has been recognized for approximately 63 years that a witness approaches a hearing before a *congressional body* with a recognized and legitimate right to refuse to answer on the ground of self-incrimination.

It is apparent that, once a legitimate right to refuse to answer on the ground of self-incrimination is recognized, a body of decisions should arise as to whether such refusal is founded upon sufficient reason, *Arndstein* v. *McCarthy, Marshal*, 254 U. S. 71, 72, 41 S. Ct. 26, 65 L. Ed. 138; *United States* v. *White*, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542, 152 A. L. R. 1202; *Hoffman* v. *United States*, 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 118; *United States* v. *Burr*, 25 Fed. Cas. page 40, No. 14, 692e; *Blau* v. *United States*, 340 U. S. 159, 71 S. Ct. 223, 95 L. Ed. 170, whether the witness in fact

invokes the rule of privilege, *Smith* v. *United States*, 337 U. S. 137, 69 S. Ct. 1000, 93 L. Ed. 1264; *Quinn* v. *United States*, supra; *Bart* v. *United States*, 349 U. S. 219, 75 S. Ct. 712, 99 L. Ed. 1016; *Emspack* v. *United States*, 349 U. S. 190, 75 S. Ct. 687, 99 L. Ed. 997, and whether the witness's refusal to answer is contumacious, i. e., whether he is made aware that, although his right to refuse to answer is recognized, his reason in the particular instance is ruled invalid and his claim of privilege rejected. *In re Chapman*, 166 U. S. 661, 17 S. Ct. 677, 41 L. Ed. 1154; *McGrain* v. *Daugherty*, 273 U. S. 135, 47 S. Ct. 319, 71 L. Ed. 580; *Sinclair* v. *United States*, 279 U. S. 263, 49 S. Ct. 268, 73 L. Ed. 692; and the *Quinn*, *Bart* and *Emspack* cases, supra.

Imposing as is the body of decisions regarding these questions, it must be remembered that each is based fundamentally upon the premise that, since sufficient immunity is not afforded the witness by the federal statute, he has a legitimate right to assert the privilege against self-incrimination. It must be remembered also that this basic premise results from the decision in *Counselman* v. *Hitchcock*, supra, which was an interpretation by the Supreme Court of the United States of the effect of a *federal* statute upon a *federal* constitutional provision.

The fact that the Supreme Court of the United States has construed the effect of a federal statute upon a portion of the federal Constitution in a certain manner, however, in no way precludes the highest tribunal of a state from construing the effect of a similar but not identical state statute (as hereinbefore set out) upon a similar provision of the state Constitution, particularly where it is well recognized that the operation of such constitutional provisions is directed exclusively and individually to the federal and state governments, *respectively*.

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"We [the Supreme Court of the United States] have nothing to do with the interpretation of the Constitution of the state and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final. The 5th Amendment to the Constitution of the United States is not restrictive of state, but only of national, action." *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 176, 52 L. Ed. 151, 28 S. Ct. 40, 45. See, also, *State of Missouri* v. *Dockery*, 191 U. S. 165, 24 S. Ct. 53, 48 L. Ed. 133, 63 L. R. A. 571; *Merchants' & Manufacturers' Bank* v. *Commonwealth of Pennsylvania*, 167 U. S. 461, 17 S. Ct. 829, 42 L. Ed. 236; and *Gabrielli* v. *Knickerbocker*, 12 Cal. 2d 85, 82 P. 2d 391.

It follows that the *Quinn* case, admittedly based upon the assumption that the defendant therein had a right to refuse to give self-incriminating answers, is not controlling in any manner in the instant cases.

The conclusions herein are based upon a source of reasoning which is separate and distinct from that in the *Quinn* case, to wit, an interpretation of the effect of a state statute upon a provision of a state Constitution, and when we conclude that, because of Section 60, General Code, appellant approached the hearing before the Ohio Un-American Activities Commission without a legitimate right to refuse to answer on the ground of self-incrimination, and that her refusal to answer on that ground constituted a violation of Section 12845, General Code, without further indication of criminal intent, we do not reach that point at which it becomes important to consider whether the commission overtly ruled upon an invalid assertion of the privilege, and, thus, the *Quinn* case is not only not controlling in this instance but it is inapplicable to the facts as well.

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It is argued also that the chairman of the commission in some way contributed to appellant's misfortune by stating to her:

> "Mrs. Morgan, I should like to advise you under the Fifth Amendment, you are permitted to refuse to answer questions that might tend to incriminate you.
> "Mrs. Morgan: Yes.
> "Chairman Renner: But you are not permitted to refuse to answer questions simply for your own convenience. Counsel may proceed."

Although the chairman obviously misstated the law, the question is whether such misstatment affected the alleged violation by Mrs. Morgan of Section 12845, General Code.

In order to find that the chairman's statement affected her *conviction*, we must necessarily find that it in some way affected appellant's *behavior at the hearing*. A thorough search of the record fails to disclose that this was the case.

Appellant indicated, in a prepared statement which she presented to the commission prior to the hearing, that she intended to "claim the protection of the Fifth Amendment and remain silent before this committee," and she refused to answer on that ground the 12 questions propounded to her *prior to the chairman's statement*. Her subsequent refusals to answer are made in the same words and manner as her prior refusals.

It is also interesting and significant to note that the chairman, at another point in the Morgan hearing, said, "Mrs. Morgan, are you aware of the fact that your failure to answer questions—some questions of this commission, might also *tend to put you in an embarrassing situation?*"

The only hypothesis consistent with the record of this hearing is that Mrs. Morgan was well aware of what she

considered to be the law and her rights thereunder, and that such statement neither mislead her nor induced her to act in any manner other than that which she deliberately chose.

The state advances the theory that a direction by the commission to answer was unnecessary since a statement read by appellant just prior to being sworn, and later introduced into the record of the hearing, is alone sufficient to establish the contumacious intent in her refusal to answer. In the light of what we have said, however, concerning the necessity of a direction to answer, it is neither necessary to consider this premise nor to give such statement, which is highly abusive and vitriolic, the dignity of perpetuation in this opinion.

Thus, since the immunity statute precluded appellant's right to claim the rule of privilege against self-incrimination, and Section 12845, General Code, Section 2917.42, Revised Code, makes a refusal to answer questions pertinent to the matter under inquiry a misdemeanor, appellant's refusal to answer under the claim of the rule of privilege constituted a violation, and as a direction thereafter could serve no substantial purpose it was unnecessary.

We are all familiar with the excesses and abuses which led to the formulation of the common-law rule, the substance of which has been incorporated into the Constitution of the United States and the Constitutions of the various states, granting each individual the right to refrain from giving testimony which may be used against him in a criminal prosecution. To expound further on this maxim and the necessity therefor would be to unnecessarily reiterate that which has already been well said many times.

This rule of privilege is a personal right whose sole purpose is to protect the individual from subjection to

pressure, physical or mental, to give evidence or testimony *upon which may be based his subsequent punishment or forfeiture.* The belief is universal in civilized countries that it is reprehensible for an individual to be required by any authority to convict himself through testimony or evidence pried from him against his will.

It must be remembered, however, that, although the people who founded our government did withhold from it certain personal privileges, justifiably, in the light of the lessons history teaches, such as the privilege against self-incrimination, they also pledged to it certain duties. Just a few of the duties owed the governments, both state and national, by each individual, who is an integral part thereof, are the duties of support by taxes, obedience to laws, defense in time of war and stress and service upon juries.

A breach of any of these duties is punishable by law on the theory that, ultimately, since the duties are owed by all, a breach by one constitutes an offense against the rest. It is thus that in many jurisdictions criminal actions are brought in the name of "the people" of the prosecuting political entity.

In like manner each citizen owes a duty to the legislative branch of the government to give it the benefit of any knowledge or facts of which he may be possessed in order that it may write the laws with as much background information and intelligence as possible.

Of course, even this duty is not superior to the protection from self-incrimination, which must for good reason remain inviolate. But when the reason for the rule, i. e., the possibility of a prosecution or penalty imposed by the inquiring sovereign and based upon coerced testimony, is satisfied by a statutory grant of immunity which is as full and complete as is necessary under the law, the legislative branch of the government is thereby enabled to demand

of the individual the performance of this duty free of a refusal to answer on the ground of self-incrimination, and may provide a penalty for the breach of such duty.

The argument that an immunity statute coupled with a statutory demand for pertinent testimony, regardless of whether it might, in the absence of immunity, be of an incriminating character, in effect amends the Constitution is without merit.

The fact is that the immunity legislation and the demand for testimony cannot amend and do not violate the Constitution nor do they abridge the rule of privilege arising therefrom. A statutory grant of immunity which is full and sufficient simply provides a witness by statute the protection against self-incrimination which the Constitution guarantees.

The Constitution and the rule of privilege merely safeguard the individual from being forced to give testimony or evidence which may be used against him in a criminal prosecution. Section 60 not only provides that the testimony given by a witness shall not be used as evidence in a criminal proceeding against him, but the statute provides further that the witness *shall not be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter or thing concerning which he testifies or produces evidence.*

It is seen that under such circumstances the state has seen fit to forfeit its right to prosecute a witness for his part in any criminal activity of which it becomes aware by virtue of testimony given by the witness before a legislative body in search of information. Thus, the witness is given more protection by immunity than is afforded him by the Constitution and the rule of privilege. Surely under these circumstances it is not improper for the government

to call upon its citizens to perform an inherent duty free of a limitation the cause for which has been statutorily removed.

It is readily seen that if the government should decide to withdraw its grant of immunity to the witness it would instantly forfeit its right to testimony or evidence which might tend to incriminate him. There would then be no protection by immunity equal to the protection by privilege, and the constitutional rule of privilege would obtain in its full force and effect.

Where there is immunity granted, however, which is so full and sufficient as to supplant the protection afforded by the rule of privilege, the refusal of a witness to give pertinent testimony upon the ground of privilege can be considered no more than an attempt to block the legislative effort and the refusal to perform a duty owed the government by virtue of citizenship; and a breach of such duty may be punished as other breaches of duty owed the government.

In conclusion, we find:

I. It was within the power granted the General Assembly by Section 8, Article II of the Constitution of Ohio, authorizing that body to obtain through committees or otherwise information affecting legislative action under consideration or in contemplation, to create the Ohio Un-American Activities Commission and to authorize it to function after sine die adjournment and to report to the following General Assembly; and, since the function and structure of such a body rather than its name determine its character, the fact that this commission had the function and structure of a select committee of the General Assembly rendered it, in fact, a "select committee" thereof entitled to all the rights and prerogatives of select committees. One

of such prerogatives is the right to bring a contempt action under the provisions of Section 12845, General Code, Section 2917.42, Revised Code, unless the committee is specifically precluded from doing so by the Legislature. No such preclusion is evident in the permissive provisions of Section 76-32, General Code, Section 103.35, Revised Code, which merely provides this particular commission with an alternative method of punishing for contempt.

II. A witness appearing before a committee of the General Assembly, who objects to a propounded question, the objection being in language which the committee might reasonably be expected to understand as an attempt to invoke the rule of privilege against self-incrimination, whether it be by a reference to the Constitution of the United States or the Constitution of Ohio, thereby invokes any privilege to which he may be entitled under either, and appellant, by refusing "under the Fifth Amendment" to answer questions, did in fact invoke any privilege to which she would ordinarily be entitled under the Constitution of Ohio.

III. Appellant's invoking of the rule of privilege in this case, however, was ineffective, since the immunity granted by Section 60, General Code, Section 101.44, Revised Code, is so full and complete as to satisfy the protection against self-incrimination guaranteed by the Constitution of Ohio and to supplant the privilege arising therefrom, and it imposed upon appellant the duty to give her testimony free of a refusal based upon this rule of privilege.

IV. A direction to answer, after appellant's refusal upon the ground of self-incrimination, was unnecessary since the immunity granted her precluded the possibility of justifying a refusal on this ground. The commission asked questions which were pertinent, and the refusal alone of the

witness to answer on the ground of self-incrimination constituted contempt.

The issue apparent in cause No. 34361 which is not involved in the Morgan appeal is whether the Ohio Un-American Activities Commission was unconstitutional in that the General Assembly had delegated to it powers and functions belonging exclusively to the judiciary of Ohio by virtue of Section 1, Article IV of the Constitution of Ohio.

At the outset it is obvious from reading those sections of the General Code relating to the Un-American Activities Commission that there was absolutely no attempt to give the commission any direct judicial authority whatsoever.

Section 76-32, General Code, Section 103.35, Revised Code, in effect specifies that any of the acts described in Section 12137, General Code, Section 2705.02, Revised Code, which may be generally described as statutorily defined contempts of court, shall be contempts of the legislative body and punishable at the behest of the commission under the procedure set out in the following sections, i. e., Sections 12138 to 12146, General Code, Sections 2705.03 to 2705.09, Revised Code.

The defendants were found guilty of violations of subdivision 3 of Section 12137. This section is clearly severable and reads as follows, so far as it affects cause No. 34361:

> "A person guilty of any of the following acts may be punished as for a contempt:
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> * * * * * *
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> "3. *A failure* to obey a subpoena duly served, or a refusal to be sworn, or *to answer as a witness, when lawfully required.*" (Emphasis ours.)

[12] It must be noted that, since Raley, Stern and Brown were convicted of violating the provision of subdi-

vision 3 of Section 12137, they have no interest in and cannot question the constitutionality of the power given the commission with regard to those parts of the statute which have nothing whatsoever to do with their convictions, regardless of whether certain of the acts which "may be punished as for a contempt" under this section and which are admittedly contempts of court could also be construed contempts of a legislative body, or made so by legislative enactment.

"... a defendant charged with the violation of a statute, but not charged with any act coming under a certain severable section of the statute, is without the interest necessary to question the validity of that section." 11 American Jurisprudence, 755, Constitutional Law, Section 111. See, also, *State* v. *Hill*, 168 La. 761, 123 So. 317, 69 A.L.R. 574.

The offense set out in the "severable section" of Section 12137, of which defendants were found guilty, is the refusal to answer as a witness when lawfully required to do so. The *power* of the General Assembly to label such refusal an offense when committed before a duly constituted legislative body and to authorize such body to cause proceedings to be instituted in a court of law for the punishment of such refusal to answer arises directly from the provisions of Section 8, Article II of the Constitution of Ohio, and not from other constitutional powers by virtue of which the General Assembly enacts legislation pertaining to courts of law.

It is seen that, regardless of the existence of Sections 12137 to 12146, General Code, Sections 2705.02 to 2705.09, Revised Code, the General Assembly could enact statutes, applying solely to legislative bodies, providing that a failure to obey a subpoena duly served or a refusal to be sworn

or to answer as a witness when lawfully required to do so would constitute an offense punishable by a court of law, and could prescribe the punishment which would follow a conviction for violating such statutes, which could be similar to if not in the exact terms as the punishment prescribed in Sections 12142 and 12143, General Code, Sections 2705.05 and 2705.06, Revised Code, which are the statutes under which sentences were or could have been imposed in the instant cases. Such statutes, in the absence of other defects, would be constitutional exercises of the power given the General Assembly by Section 8, Article II, supra.

In this instance it is seen that the General Assembly merely exercised the power given it by Section 8, Article II, in making by reference that which is admittedly a statutory offense with regard to the judiciary a statutory offense with regard to this body of the General Assembly, by including, by reference, the offense, described in subdivision 3 of Section 12137, General Code, Section 2705.02(C), Revised Code, in Section 76-32, General Code, Section 103.35, Revised Code.

The General Assembly having the power to define the offense has the power to prescribe the punishment therefor and the procedure to be followed by its bodies in imposing such punishment, and this it has done in this instance in the same manner in which it chose to define the offense, i. e., by reference.

The fact that the procedure outlined provides for the institution of proceedings in a court of law under specific sections of the General Code certainly indicates an acquiescence to the judiciary rather than an attempted usurpation of its power.

[13] Thus, the inclusion by reference in Section 76-32, General Code, Section 2705.02, Revised Code, of the Un-

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American Activities Commission sections, of paragraph 3 of Section 12137, General Code, paragraph 3 of Section 2705.02, Revised Code, providing that one "may be punished as for a contempt" for the "refusal . . . to answer as a witness, when lawfully required," and Sections 12138 to 12146, General Code, Sections 2705.03 to 2705.09, Revised Code, of the Chapter on Contempt of Court, setting out the procedure to be used in proceedings based upon such refusal and the punishment upon conviction therefor, is a valid exercise of the legislative power under Section 8, Article II of the Constitution, empowering the Legislature to compel the attendance and testimony of witnesses. Furthermore, it is clearly not a delegation of judicial power to the Un-American Activities Commission but constitutes merely a definition as to what shall constitute a contempt of such commission and a method of procedure by which proceedings may be instituted by the commission in a judicial tribunal for the punishment of the contempt.

For the reasons given in the Morgan appeal, the defendants *were* lawfully required to answer the questions set out in the indictments, and their refusal to answer on the ground of self-incrimination constituted violations of paragraph 3 of Section 12137, General Code, which, by virtue of Section 76-32, General Code, applies to refusal to answer when lawfully required by the Ohio Un-American Activities Commission.

It follows from what has been said that the judgment of the Court of Appeals for Franklin County in cause No. 34311, affirming the judgment of the trial court which dismissed certain counts of the indictment for repetition and impertinency and found appellant guilty upon the remaining counts, should be, and it hereby is, affirmed; and that the judgment of the Court of Appeals for Hamilton

County in cause No. 34361 should be, and it hereby is, affirmed.

Judgments affirmed.

WEYGANDT, C. J., and ZIMMERMAN and BELL, JJ., concur.

HART and TAFT, JJ., dissent.

STEWART, J., dissents in part.

HART, Judge (dissenting).

At the outset, let me say that I have no sympathy with the positions of the defendants, the espousal of which makes it necessary, in their view, to refuse to answer the questions submitted by the legislative committee. However, the defendants are entitled to all rights guaranteed to them by the constitutions and the laws of the land.

My dissent is directed to the subject discussed in division III of the majority opinion. The question involved is whether, even though the Ohio immunity statute therein referred to is sufficient to impose upon a witness the duty to testify without the necessity of invoking the privilege as to self-incrimination, the witness nevertheless has a right under the Fifth Amendment to refuse to answer questions in a state proceeding because answers to such questions may be used to incriminate him in a federal prosecution wherein the Ohio immunity statute would not operate to give him protection.

The majority opinion says:

> "... the state and national governments are held by the Supreme Court of the United States to be separate sovereignties, and protection by one in granting sufficient immunity within its domain is sufficient to impose upon the witness the duty of testifying without invoking the privilege of self-incrimination, without regard

to protection against the other within its separate domain.

* * * * * *

"We find no valid reason for disagreeing with the interpretations and applications by the Supreme Court of the United States, as hereinbefore set out, and conclude that the inability of the state of Ohio to provide immunity from possible federal prosecution does not defeat the immunity statute here under consideration, which grants complete immunity from prosecution by the state."

In the case of *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, the Supreme Court had before it the question of the right of a witness to refuse to testify before a federal grand jury in the Northern District of Illinois concerning an alleged violation of an "'act to regulate commerce,'" on the ground that his answer, if given, would tend to incriminate him. For refusal to answer Counselman was incarcerated. He brought a habeas corpus action to test his right to refuse to testify. In the opinion of the Circuit Court it was held that, although under the Fifth Amendment no person can be compelled to disclose facts before a court or grand jury which might subject him to a criminal prosecution, nevertheless, since the immunity provided by Section 860 of the Revised Statutes of the United States was coextensive with that of the Constitution, Counselman was entitled to no privilege under the Constitution. Section 860 of the Revised Statutes provided that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture.

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The Supreme Court reversed the judgment of the Circuit Court and in the course of its opinion said:

> "It remains to consider whether section 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence nor used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. . . .
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> "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. It is to be noted of section 860 of the Revised Statutes that it does not undertake to compel self-criminating evidence from a

party or a witness. In several of the state statutes above referred to the testimony of the party or witness is made compulsory and in some either all possibility of a future prosecution of the party or witness is distinctly taken away, or he can plead in bar or abatement the fact that he was compelled to testify.

"We are clearly of opinion that *no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States.* Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. *In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. . . .*" (Italics supplied.)

Specifically, the court in that case held, as stated in the headnotes to the S. Ct. report:

"1. The privilege given by the Fifth Amendment to the Constitution that no person shall be compelled in any criminal case to be a witness against himself extends to a proceeding before a grand jury.

* * * * * *

"3. Section 860 of the Revised Statutes, which provides that the evidence of a person shall not be used against him in any proceeding for a crime or penalty, or forfeiture, does not take away his privilege, given by the Constitution, that he shall not be compelled in any criminal case to be a witness against himself.

"4. A witness is protected by the constitutional provision from being compelled to disclose the circumstances of his offense, or the sources from which or the means by which evidence of its commission, or of

his connection with it, may be obtained or made effectual for his conviction.

"5. Legislation cannot abridge a constitutional privilege, and cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect.

"6. No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.

* * * * * *

"8. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

The judgment of the Supreme Court of the United States in the *Counselman* case was approved in the later case of *United States* v. *Bryan*, 339 U. S. 323, 70 S. Ct. 724, 732, 94 L. Ed. 884, in which the provisions of Section 859 of the Revised Statutes of the United States were under consideration. The court said:

"We need not set out the history of the statute in detail. It should be noted, however, that its function was to provide an immunity in subsequent criminal proceedings to witnesses before congressional committees, in return for which it was thought that witnesses could be compelled to give self-incriminating testimony. That purpose was effectively nullified in 1892 by this Court's decision in *Counselman* v. *Hitchcock* . . . holding that R. S. § 860, a statute identical in all material respects with R. S. § 859, was not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions. Under that decision, a witness who is offered only the partial

> protection of a statute such as §§ 859 and 860—that his testimony may not be used against him in subsequent criminal proceedings—rather than complete immunity from prosecution for any act concerning which he testifies may claim his privilege and remain silent with impunity."

It is true that the Ohio immunity statute provides not only that the testimony of a witness before such a committee shall not be used as evidence in a criminal proceeding against him, but that a person shall not "be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing, concerning which he so testifies." However, although a witness may refuse to testify in a federal court as to matters tending to incriminate him, he cannot prevent the use in a federal court of testimony of the same character voluntarily given by him in a state court under a state immunity statute. *Feldman* v. *United States*, 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408, 154 A. L. R. 982.

How then, notwithstanding some apparent obiter in decisions of the federal Supreme Court, can a state immunity statute, which compels a witness to answer questions which incriminate him and which admittedly in turn may be used to incriminate him in a federal prosecution where the state immunity statute even against prosecution is wholly inoperative to protect him, be valid in view of the constitutional rights of the witness under the Fifth Amendment to the federal Constitution among which is the over-all right to avoid compulsory self-incrimination?

In the instant cases, where the claimed subversive acts of the defendants as against the state government may also be the basis of a prosecution by the federal government for subversive acts against it or the states, I am of

the opinion that under the protection of the Fifth Amendment these defendants could lawfully refuse to answer incriminating questions before the legislative committee, notwithstanding the purported protection of the state immunity statute.

STEWART, Judge (dissenting in part).

I could well concur in the syllabus, majority opinion and judgments in the present cases were it not for a glaring feature of the record, which has been glossed over in the majority opinion and to which I shall presently allude.

It must be remembered that the defendants were not tried upon any charges of Communistic activities or upon the abhorrent statement made by Mrs. Morgan, the sole charge against each of them being contempt, which the General Assembly has made a mere misdemeanor punishable only by a fine, Section 12845, General Code, Section 2917.42, Revised Code, in the *Morgan* case, and by a fine of not more than $500 or imprisonment for not more than 10 days, or both, Section 12142, General Code, Section 2705.05, Revised Code, in the *Raley, Stern and Brown* case. Therefore, the vital question in the cases is, were the defendants guilty of contempt by standing on their claim of self-incrimination in refusing to answer some of the questions propounded to them by the commission?

The majority of the court reasons that, since the Ohio immunity statute gave the defendants immunity from the use of any of their testimony as evidence in any criminal proceeding in this state, and since the Supreme Court of the United States has decided that lack of state power to give witnesses protection against federal prosecution does not defeat the effect of a state immunity statute to abolish protection against self-incrimination, the Ohio immunity statute deprived the defendants of the protection against

self-incrimination afforded by the Constitution; and that, since defendants were presumed to know the law, they were in contempt by not answering the questions propounded to them by the commission, because their right of protection against self-incrimination had been abolished.

Ordinarily, this reasoning would be quite logical, but, in the present cases, assuming that defendants were mistaken in their right to rely upon protection against self-incrimination, the commission was likewise mistaken as to the state of the law.

The commission was composed in part of able and experienced lawyers, and it hired special counsel, and yet the defendants were informed by the chairman of the commission that they had a right to rely upon their constitutional privilege against self-incrimination.

In the *Morgan* case, the chairman of the commission stated: "Mrs. Morgan, I should like to advise you under the Fifth Amendment you are permitted to refuse to answer questions that might tend to incriminate you."

Even if the chairman was mistaken as to the law and the effect of the Ohio immunity statute, and Mrs. Morgan was likewise mistaken, how can it be said that she was in contempt of the commission in strictly following its direction and admonition? The point is further emphasized by the fact that in every instance when she refused to answer a question, claiming protection against self-incrimination, she was never directed to answer the question but the interrogator immediately proceeded with another inquiry.

With reference to the *Raley, Stern and Brown* case, the chairman of the commission was a witness and testified as follows:

> "It was the policy of the commission not to press questions which we felt would be of an incriminating

nature. For instance, whenever a witness was asked a question—I believe every witness before the commission was asked the question—are you or have you ever been a member of the Communist Party, and if the witness refused to answer that question, we did not press it. Frequently I made statements which indicated the policy of the commission. Whether it was to half of the witnesses before the commission or not, I don't know. Probably less than half. But the statement was, 'We will not require you to answer questions which may incriminate yourself, but we want it clearly understood that you may not refuse to answer questions on the ground it would incriminate some one else.' And I think through the record generally, although not probably always when I made the statement with respect to one it included the other."

It seems to me that, since the defendants were apprised by the commission at the time they were testifying that they had a right to refuse to answer questions which might incriminate them, they could not possibly in following the admonition of the commission be in contempt of it except possibly as to the questions which the defendants were directed to answer.

In such a situation the case of *Quinn* v. *United States*, 349 U. S. 155, 75 S. Ct. 668, 674, 99 L. Ed. 964, which was properly cited in the majority opinion in support of the third paragraph of the syllabus, is controlling with reference to the necessity of demanding an answer from a witness testifying before an investigating committee before the refusal of the witness to answer can place him in peril of prosecution for contempt.

The *Quinn* case involved a witness, before a federal legislative committee, charged with contempt. Speaking for the court, Mr. Chief Justice Warren said:

Appendix "A"

"Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intentional refusal to answer. This element of the offense, like any other, must be proved beyond a reasonable doubt. Petitioner contends that such proof was not, and cannot be, made in this case.

"... In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question.

"Was petitioner so apprised here? At no time did the committee specifically overrule his objection based on the Fifth Amendment; nor did the committee indicate its overruling of the objection by specifically directing petitioner to answer. In the absence of such committee action, petitioner was never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt. At best he was left to guess whether or not the committee had accepted his objection."

In the *Morgan* indictment the charges are that she did "unlawfully and wilfully refuse to answer."

Under the situation in the present cases, it seems clear to me that the defendants after being apprised by the commission that they had a right to rely upon the protection against self-incrimination, could not be in contempt of the commission except as to the few questions which two of them were directed to answer.

TAFT, Judge (dissenting).

In the *Morgan* case (No. 34311) the defendant was indicated under Section 12845, General Code, Section 2917.42, Revised Code, which reads:

"Whoever, having been subpoenaed or ordered to appeal before either branch of the general assembly,

or before a standing or select *committee of the general assembly*, or either branch thereof, fails so to do, or, having appeared, refuses to answer a question pertinent to the matter under inquiry. . . ." (Emphasis added.)

If the General Assembly, by what it said in providing for the Un-American Activities Commission, expressed an intention that it should be regarded as something other than "a standing or select committee of the general assembly," then the foregoing statute did not authorize this defendant's indictment. By Section 8, Article II of the Constitution of Ohio, authority is provided for obtaining information affecting legislative action "through committees *or otherwise.*" It was not necessary therefore for the General Assembly to obtain the information to be secured by the Un-American Activities Commission through a "committee." It could obtain it "otherwise." *State ex rel. Herbert* v. *Ferguson*, 142 Ohio St. 496, 52 N. E. (2d) 980.

Under "Part First: Political, Title II, Legislative; Chapter 1, General Assembly," of the General Code, there is a subtitle "Powers of Committees." See "An Act to Revise and Consolidate the General Statutes of Ohio," passed by the General Assembly of Ohio, February 14, 1910, and approved by the Governor, February 15, 1910. Under this subtitle are six sections. Provision is made by Section 57 for subpoenas for witnesses and for books, papers and records, by Section 58 for service thereof, by Section 59 for punishment for disobeying a subpoena or refusing to answer a pertinent question, by Section 60 for immunity with respect to testimony "before a committee or sub-committee," by Section 61 for fees of sheriffs and witnesses, and by Section 62 for the administration of oaths. From a reading of these sections, it is apparent that they are to deal as stated therein with "a standing or

select committee of the general assembly or of either house thereof" or a "subcommittee" of such a "committee." Section 57, General Code. The word "committee" is used in each section and appears 19 times in the six sections. The word "commission" is not used anywhere in these sections.

Provision was first made by statute for the "un-American activities commission" by enactment of Sections 76-28 to 76-35, inclusive, General Code, in 1951. Section 76-28 states that "There is hereby created an un-American activities *commission in the legislative branch of the government.*" (Compare this with the words "a standing or select committee of the general assembly or of either house thereof" found in Section 57, General Code.) Thereafter, the word "commission" appears in each of the eight statutory sections, Sections 76-28 to 76-35, inclusive, General Code, and it appears a total of 29 times in those sections. Nowhere in those sections is there any suggestion that the General Assembly regarded this "commission" as a "committee." It studiously and successfully avoided the use of the word "committee." This was probably done because this "commission" was to act after the sine die adjournment of the General Assembly, and the General Assembly was probably fearful that a "committee" of the General Assembly would cease to have any existence on and after such adjournment, as apparently held by the decision of this court in *Gayman* v. *State ex rel. Rulison,* 79 Ohio St. 444, 87 N. E. 1136, affirming 11 Ohio C. C., N. S., 257, 21 Ohio C. D. 59.

Specific provisions were made in the act creating this "commission" for administering oaths, issuing subpoenas, compensation of witnesses, and punishment of witnesses disobeying a subpoena or refusing to testify. If the "commission" were a "select committee of the general assembly," such provisions would have been unnecessary because

of the provisions of Sections 57 to 62, General Code. However, no provision was made as to immunity with respect to testimony before such "commission"; and the provision made for punishment of witnesses before the "commission," Section 76-32, General Code, was different from that which was provided for that purpose with respect to "committees" by Section 59, General Code.

My conclusion therefore is that the General Assembly clearly expressed an intention that the Un-American Activities Commission should be regarded as something other than a "committee of the general assembly." It follows that Section 12845, General Code, did not authorize the indictment in the *Morgan* case.

In the *Raley* case (No. 34361), for the purpose of escaping the contention that the witnesses should have been directed to answer questions after their claims of privilege, see *Quinn* v. *United States*, 349 U. S. 155, 75 S. Ct. 668, 99 L. Ed. 964; *Emspak* v. *United States*, 349 U. S. 190, 75 S. Ct. 687, 99 L. Ed. 585; and *Bart* v. *United States*, 349 U. S. 219, 75 S. Ct. 712, 99 L. Ed. 1016, the decisions of the majority is rested upon the premise that Section 60 (quoted so far as pertinent under IV in the majority opinion) grants immunity with respect to testimony before the Un-American Activities Commission. From the words of that section, it is clear that it relates only to "testimony . . . before a committee" of the General Assembly or of either house thereof or a subcommittee of such a "committee." Since, as hereinbefore pointed out, the General Assembly clearly expressed an intention that the Un-American Activities Commission should be regarded as something other than such a "committee," the premise relied upon by the majority will not support their decision. There is no statutory grant of immunity with respect to testimony before the Un-American Activities Commission.

Appendix "B"

A copy of the opinion of the Court of Appeals for the First Appellate District of Ohio as furnished counsel is attached as Appendix "B". The opinion, with some changes in punctuation and grammar, is officially reported in 100 O. App. 75, Ohio Bar Advanced, No. 27, July 2, 1956.

IN THE
COURT OF APPEALS OF OHIO
HAMILTON COUNTY

No. 7856

THE STATE OF OHIO,

Plaintiff-Appellee,

v.

RALEY, ET AL.,

Appellants.

APPENDIX "B"

(November 15, 1954)

C. WATSON HOVER and CARL RUBIN *for Plaintiff-Appellee.*

LOUIS C. CAPELLE, MORSE JOHNSON, MILTON H. SCHMIDT, CHESTER R. SHOOK *for Defendants-Appellants.*

MATTHEWS, P. J.

The defendants-appellants were indicted separately for contempt of the Un-American Activities Commission created and organized in accordance with the provisions of Sections 76-28 to 76-35, both inclusive, of the General Code (R. C. §§ 103.31 to 103.38, both inclusive) as supplemented by the Act of the General Assembly passed on the 1st day

of June, 1951. By agreement, the cases were consolidated for trial in the Common Pleas Court. By entry of Court, on agreement of counsel, they have been consolidated for the purpose of this appeal.

Hereafter, the defendants-appellants will be referred to as the defendants, and the plaintiff-appellee as the State.

Th contempt charged is that the defendants, after having been duly sworn as witnesses before a duly constituted session of the Un-American Activities Commission, refused to testify in response to certain questions propounded to them.

It is charged that defendant Stern refused to answer two questions, defendant Brown four questions, and defendant Raley sixteen questions. Each refusal was charged as a separate offense.

The defendants waived their right to a jury and elected to be tried by a Judge of the Court in which the indictments were pending.

After motions to quash, pleas in abatement and demurrers had been overruled, the trial proceeded, and at its conclusion the Court found the defendants guilty as charged and sentenced each to imprisonment in jail for ten days and to pay a fine of $500.00 on each count, the prison sentences, however, running concurrently and the fines, other than the first one, being remitted.

The motions to quash, the pleas in abatement and the demurrers raised substantially the same questions. They attacked the constitutionality of R. C. § 103.31 et seq., under which the Un-American Activities Commission assumed to act, denied the legal existence of such commission, and then assailed the right of the Commission generally, and, in particular, to require the defendants to answer the questions upon which the indictments were based against the

defendants' claims of privilege from answering under Article I, Section 10 of the Constitution of Ohio, and the 5th and 14th Amendments of the Constitution of the United States.

That the General Assembly, both by implication from the grant of power to legislate, and by express constitutional grant (Art. II, Sec. 8) has power to "obtain through committees or otherwise, information affecting legislative action under consideration or in contemplation is too clear for debate. And when the enabling act is in the form of a law, approved by the Governor, or passed over his veto, and the subject matter about which the information is sought comes within the legislative power of the State, its validity is doubly clear.

Of course, where the enabling act provides for the appointment by the General Assembly of a committee or commission composed of its members, the authority of the members of such committee or commission would necessarily expire on the termination of their legislative term. The General Assembly is denied appointive power by the Constitution except in a few specified exceptions. (Art. II, Sec. 27.) One of the exceptions is the power given it to appoint its own officers, including, of course, committees of its own members, but, as already stated, these appointments cannot be for a longer life than that of the appointing power. The qualification to serve on the committee or commission is conditioned upon continued membership in the General Assembly.

It is claimed that as the General Assembly had adjourned sine die before the hearing at which the defendants were questioned, the authority of the Commission had expired. We do not think that is the test of the duration of the Commission's authority. We are of the opinion that the Commission's life was limited only by the length of the

term for which its members were elected to the General Assembly, subject, of course, to the repeal of the law in the meantime. We are also of the opinion that the law does purport to confer authority beyond the adjournment sine die of the General Assembly, but does not assume to confer any authority beyond the term for which they were elected. It is true that the law requires the filing of its entire file with the clerk of the Senate on January 1st, 1953, and the filing of its report and recommendations with the 100th General Assembly and the Governor on that date; but that was no more than a winding up of its affairs and the delivery of the State's property in its possession to the designated State officials. It's little, if any, more than would be implied as a duty on expiration of the term to surrender the office and its accessories to the successor or official entitled.

It should be noted that this Commission is created by a law as distinguished from a legislative resolution. This law authorizes it to report from time to time to the General Assembly, to the people and to the Governor, and that it should complete its work so that it could make its final report on January 1st, 1953, and that this final report should be made not only to the 100th General Assembly, but also to the Governor, which would be during the term of the Governor who approved the law. The fact that this Commission was created by law expressly provided for its continuance after adjournment, distinguishes this case from the cases relied on by the defendants. We assume that the power of the appointment to the committee of members of the legislature would expire at the end of their legislative terms except for the purpose of winding up the affairs of the committee by delivering its file to the proper custodian.

In 81 Corpus Juris Secundum, at 958 and 959, it is said: "While legislative committees, in the absence of special

authority, can act only while the legislature is in session, it is within the power of the legislature *as a whole*, in the absence of constitutional restriction, to appoint committees to sit after adjournment, or during a recess." In the text at page 959, it is also said: "Generally, neither branch of the legislature may, by independent action, create an investigating committee with power to sit after adjournment of the legislature, and, in order to continue or appoint a committee whose work of investigation is to proceed after the adjournment of the body which created it, the enactment of a law by bill passed in the manner prescribed by the constitution, is required in some jurisdictions."

See, also: *Swing* v. *Riley*, 90 Pac. (2d) 313.

A law, of course, continues operative indefinitely, or until it expires by express limitation or repeal. A resolution by one branch of the legislature, or even by both, differs from a law in this respect. This distinction represents the difference between the authorities relied on by counsel for defendants and the case at bar.

Defendants' counsel relies on *State, ex rel.* v. *Gayman*, 11 C. C. (N.S.) 257, (affirmed without report in 79 Ohio St., 444), and Opinion of Attorney General of 1935 #4557, at page 1041. We believe they are inapplicable. In both instances, the question related to the power after adjournment sine die of committees appointed by resolution of either one or both houses. Neither related to a committee appointed in pursuance to the terms of a law, as in the case at bar.

So we conclude that the adjournment sine die of the General Assembly had no effect upon the power of the Un-American Activities Commission created by the joint action of all branches of the law making agencies of the State.

But it is asserted that the act of the legislature creating the Un-American Activities Commission invaded a field of

government in which the United States government has paramount authority under the Constitution of the United States and that the United States had already rightfully occupied the field by the enactment of the so-called Smith Act, and, perhaps, other laws, and that it authorizes investigations not exclusively for the purposes of the General Assembly, but for other purposes, including agencies of the United States Government.

To properly discuss this assertion, it is necessary to set forth section 76-31, G. C., in which power was conferred upon the Commission. That section provides:

"The commission shall have the power and duty

(1) To investigate, study and analyze

(a) all facts relating to the activities of persons, groups and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means;

(b) all facts concerning persons, groups and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government or the industrial potential of this state;

(c) the operation and effect of the laws of the state, of the several other states, and of the United States, which purport to outlaw and control the activities enumerated above and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary;

(2) To maintain a liaison with any agency of the federal, state or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of

this state or of the United States by force, violence, intimidation, sabotage or threats of the same.

In addition thereto the commission shall have such additional rights, duties and powers as may be necessary to enable it fully to exercise those specifically set forth herein and to accomplish its lawful objectives and purposes."

In the first place it is contended by defendants' counsel that this law attempts to confer power to invade the national domain. They point out that the Un-American Activities Commission is authorized by this law to investigate, study and analyze all activities having as their objective the overthrow or reform "of our constitutional *governments* by fraud, force, violence, or other unlawful means"; also activities which might adversely affect Ohio's contribution to the national defense, the safety of the State, the functioning of any agency of the State or National government; also the operation and effect of the laws of this and other States, and of the United States on the subject, and to maintain a liaison with agencies for the purpose of devising means of disclosing persons and groups who seek to overthrow the government of either the United States or this State by force and violence. The purpose is stated to be to furnish the basis for recommending such additional legislation as might be found advisable and necessary.

It is said that sedition and treason against the United States are matters within the jurisdiction of the United States, and beyond the jurisdiction of the individual states. We think it is also implied that there is no such thing as sedition or treason against an individual state. We cannot agree with either of these claims. Sedition and treason against the United States as a sovereign entity are neces-

sarily offenses also against every sovereign State of the Federal Union. Their relation to one another is fixed by the United States Constitution, which, by its terms, makes the United States Government within its domain paramount. However, it leaves the States paramount sovereigns in all governmental matters not transferred to the United States government. It does not create hostile sovereignties, or sovereignties joined together in a loose confederacy. It creates "an indestructible Union, composed of indestructible States." While each should be on guard to protect its own domain, it should be equally on guard to see that the others should be secure in their respective domains.

The United States Constitution contains many provisions emphasizing the spirit of friendship, cooperation and comity that it created among the States. And many laws by the United States as well as by the individual States have been passed to implement this spirit of cooperation for the common good. Speaking of this spirit of comity, Chief Justice Taft said in *Ponzi* v. *Fessenden, et al.*, 258 U. S. 254, at 259, that:

> "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deply interested that each system shall be effective and unhindered in its vindication of its laws."

It is said that assuming that it is appropriate for state governments to cooperate with other states of the United States without surrendering any of their sovereign powers, that this cooperation cannot be accomplished through their

legislative department. That, it seems to us, depends on the nature of the subject matter and the purpose of the cooperation. If the subject matter is legislation, and the purpose is to provide information as a base for legislation, it is entirely appropriate for the State to be represented in the cooperative effort. And that was the purpose of the cooperation proposed by this legislation. On the basis of their investigation the Commission was charged with the duty of recommending such additional laws as it might deem necessary or advisable.

That sedition and treason are proper subjects of state action, there can be no doubt. This is recognized in Section 2 of Art. IV of the United States Constitution, wherein it is provided that "A person charged in any state with Treason, Felony or other Crime who shall flee from Justice and be found in another State" shall, upon demand, be delivered up by the executive of the state in which the traitor is found. While treason against the United States is necessarily treason against every state as well, the reverse of that is not true. Treason against a state is not necessarily treason against the United States. There have not been many recent instances of trials for treason or sedition against an individual state of the United States, but there were frequent instances in the early history of this Country. The most renowned one was the trial and conviction of Thomas W. Dorr by the Court of the State of Rhode Island, about 1841. When Rhode Island declared its independence of Great Britain and became one of the United States, it chose to continue the Charter granted to it by Charles II in 1660, as its fundamental law. One of its provisions limited the right to vote to those owning property of a substantial amount. The charter contained no provision for its amendment. Dorr and his followers agi-

tated for a new constitution containing a broadening of the base of franchise. The established government refused to take any action to call a constitutional convention. This led to violence and Dorr and his associates called a popular convention which adopted a constitution for the State and then made an unsuccessful attempt to seize the state arsenal. This became known as Dorr's Rebellion. After the rebellion was put down, Dorr was indicted for treason in the state court, found guilty, and sentenced to life imprisonment. An effort was made to invoke the jurisdiction of the United States Supreme Court to review his conviction, but the effort failed. *In Re Dorr,* 3 How. (U. S.) 103. Neither in that case nor in the subsequent case of *Luther* v. *Borden,* 7 How. (U. S.) 1, growing out of the same rebellion, did the Supreme Court say or intimate that Rhode Island had acted beyond its jurisdiction.

In 52 Am. Jur., 801, it is said: "Treason by levying war against a state has been held not necessarily treason against the Federal Government; but if the intention is to subvert the State Government, and then withdraw it from the Union, this would constitute levying war against the United States."

Counsel relies on the recent case of *Commonwealth* v. *Nelson,* 377 Pa. 58, 104 Atl. (2d) 133, which held that as Congress had passed the Smith Act on the subject of sedition, it had thereby impliedly preempted the field and excluded the State from legislating on the same subject. Consequently, it declared the Pennsylvania Sedition Act was suspended. In reaching this conclusion, the Court relied strongly upon *Hines* v. *Davidowitz,* 312 U. S. 52, in which the Supreme Court declared the Pennsylvania Alien Registration Act unconstitutional. One of the judges in *Commonwealth* v. *Nelson, supra,* dissented and pointed out

the difference between the grant of power over external affairs by the United States Constitution, and the grant of power over internal affairs. In external affairs there is no competing sovereignty with which power must be divided, whereas, in internal affairs, all powers, not granted, is reserved to the States or the people thereof. At page 154 of 104 (2d) Atl. Reporter, the dissenting judge said: "A reading of the majority opinion (*Hines* v. *Davidowitz*) makes it clear that the basis for the decision was the Court's conviction that a State Alien Registration Act would likely involve us in grave international controversies and might even lead to war. No such result could possibly ensue from state treason or sedition laws."

The authority of *Commonwealth* v. *Nelson, supra,* is weakened by the fact that since the case at bar was submitted the Supreme Court of the United States in response to the petition of the Attorney Generals of twenty-five states has granted a writ of certiorari and the case is now pending in that court for review.

Furthermore, we do not think *Commonwealth* v. *Nelson, supra,* is applicable in any way to the facts of this case. That case involved the State's sedition act—a penal act—defining a crime and prescribing punishment. We are not confronted with a penal statute in the case at bar. The statute here under consideration is not primarily a penal statute of any sort. It is law creating a legislative commission with power to investigate and make a report of its findings and conclusions on subjects coming within the reserved power of the state.

Next, it is urged that the act attempts to confer judicial power upon the Un-American Activities Commission, in that it authorizes cooperation or liaison with all departments of government, both State and Federal, and confers

judicial power in the provision relating to contempt. It is also pointed out that the proceeding by indictment is not authorized by law.

We find there is no attempt to confer judicial power upon the Un-American Activities Commission. None of the powers referred to is exclusively judicial.

The fact that the legislature referred to existing statutes on the subject of contempt in specifying what acts were punishable as contempts does not confer judicial power notwithstanding the statutes referred to deal with contempt of courts. Furthermore, we are not required in this case to refer to Section 12137, General Code, for the reason that Section 76-32, expressly and specifically makes "refusal of any person or officer to testify" a contempt of the Commission.

Nor do we think the provision invalid that directs that contempt proceedings should be in accordance with Sections 12138 to 12146, General Code. Those sections provide for a written charge, an entry thereof on the journal, opportunity to be heard in person or by counsel and a trial before the court with opportunity to make any defense the accused may have. All this was accorded the defendants. The fact that the charge took the form of an indictment, it seems to us, is immaterial. Instead of omitting anything designed to protect the accused, it gave them a mantle of protection to which, perhaps, they were not entitled. Undoubtedly, contempt of the Un-American Activities Commission is an affront to the dignity of the State of Ohio, punishable by a fine of not more than $500.00, or imprisonment of not more than 10 days, or both. G. C. § 12142. It is, therefore, a misdemeanor. By section 13437-34, G. C., misdemeanors may be prosecuted on information sworn to by the Prosecuting Attorney, but that is permissive, and the prosecution may be instituted by indictment.

On this phase of the case, it is our conclusion that the law creating the Un-American Activities Commission is a constitutional exercise of power by the legislature and that the power conferred upon it had not expired at the time it held its meetings at which the defendants were called upon to testify.

Perhaps we should notice the contention that the defendants would not be in contempt in any event, because they were not ordered to answer after their claim of privilege. It seems to us that the wording of section 76-32, R. C., is sufficient answer to this contention. It expressly makes "refusal" to answer any question on any subject concerning which "he may be lawfully interrogated" a contempt. The observance of no particular ritual must be pursued in order to place the witness in contempt. The only requirement is that it be made to appear that he knowingly, deliberately and with full knowledge of the consequences refused to testify. The question is whether this record shows a deliberate refusal with full knowledge of the consequences.

But it is urged that the defendants were excused from answering by the constitutional provisions—state and Federal—providing that no person shall be required to be a witness against himself in any criminal case or required to testify before any governmental tribunal to any matter that might tend to incriminate him. That claim requires an examination of the questions propounded in the light of all the surrounding circumstances. And what were the circumstances? The only significant circumstance was that the Un-American Activities Commission was created to ascertain whether there existed in Ohio any evidence of treason, sedition or any other acts having for their object the subversion of government by force and violence, and thereafter

to report what it had found with its recommendations as to what, if any, legislation was necessary or advisable. A witness called before it would naturally take cognizance of that purpose. Such a person would have no right, however, to conclude that the purpose of the Commission was to entrap him into confessing a crime or into giving evidence, having a tendency to incriminate him and to act as though that was the purpose. It was not a grand jury seeking evidence upon which to base an indictment. Properly viewed, it presents the aspect of an impersonal inquiry to elicit facts as to the actual state of the social order and not to secure evidence to support a predetermined conclusion, or to discredit anyone.

And in determining whether the claim of privilege was justified, we must bear in mind that the mere claim of privilege cannot be regarded as a defiance of the law or the Commission, and it must also be remembered that at the time of this hearing mere membership in the Communist Party had not been made a crime either by the State of Ohio or by the United States of America. The Communist Party had not been outlawed. However, the Smith Act of Congress, making sedition a crime, and the Ohio statute making syndicalism, that is, advocacy of force, violence and terrorism, as a means of effecting political or economic change, a crime, were in force.

Before considering the claim of privilege from testifying under the provisions of the 5th and 14th Amendments of the Constitution of the United States and section 10 of Article I of the Constitution of Ohio, it is necessary to revert to the contention of appellants that after they claimed the privilege they were not ordered to answer and that until there is a refusal to testify, after ordered to do so, no contempt has been shown, or at least, it is asserted

that the Commission appeared to accept the claim of privilege, and that the mere claim of privilege cannot be used as a basis for contempt, and that that is all this record shows.

We agree that the record must show contumacious conduct on the part of the witness, but we do not agree that the law requires that state of wilful resistance to be disclosed by an exclusive ritual.

The United States Court of Appeals, District of Columbia Circuit has made an exhaustive study of this question in three cases pending before it at the same time. There were lengthy principal, concurring and dissenting opinions in each case, but upon this question with which we are concerned there was no disagreement as to the correct rule. The disagreement related to its application to the facts and to other questions foreign to our problem.

In *Quinn* v. *United States,* 203 Fed. (2d) 20, Quinn was asked whether he was or ever had been a member of the Communist Party, to which, instead of making a direct answer, he referred to a statement made by a former witness and stated that he took the same position. There was a question of whether the statement of the former witness was an adequate claim of privilege, but upon the question of the duty of the tribunal upon an assertion of the constitutional right to refuse to testify to incriminating circumstances, the Court, in a concurring opinion, at 33, said:

> "Although there is no talismanic formula which the Committee must use in directing the witness to answer, I would state the principle this way: It must appear from all the circumstances that (1) the witness was clearly apprised, and not left to the risk of guessing under pain of criminal penalties, whether the grounds for his objection to answering were accepted or rejected, and that (2) if rejected, he was given another

opportunity to answer. Under this view the Committee would necessarily have to inform the witness in time to allow opportunity for answering. I think it implicit in Bart that the ruling must be that of the inquiring authority (the Committee here). The Court there says that '(i)f the actual questioner be counsel instead of the inquiring authority, or a member of it, the attitude . . . of that authority may be made clear by prior announcement or by acquiescence or ratification. That phase of the matter must be determined from the circumstances.' I take this to mean that it must clearly appear to a reasonable person in the position of the witness that the ruling is, in fact, that of the inquiring authority or its duly authorized presiding member acting on its behalf."

In *Bart* v. *United States,* 203 Fed. (2d) 45, Bart was indicted for refusal to state what his name was when he came to the United States, what his father's name was, under what name his father became a citizen of the United States, and what his father's name was before he changed it. The basis of the refusal to answer was that the questions were not pertinent to the inquiry that the Congressional Un-American Activities Committee was authorized to conduct, but that ground was abandoned upon oral argument to the court and reliance placed upon the claim that Bart was not in contempt because the Committee had not ordered him to answer. The Court rejected this contention, saying at page 48 that:

"We have held in *Emspak* v. *United States,* 91 U. S. App. D. C. 378, 203 Fed. (2d) 54, decided today, that there is no requirement that a specific direction to answer be given after a refusal to answer. Emspak's contention was directed to the necessity for a specific direction to answer after an asserted claim of the privilege against self-incrimination. It was clear upon the record, certainly as

to some of the questions, that Emspak was made indisputably aware of the attitude of the Subcommittee toward his refusals and his grounds for the refusals; indeed his counsel made no contrary contention in that respect. In the present case the basic problem recurs in a different framework. For that reason we add to the discussion in the Emspak case."

Now in *Emspak* v. *U. S.*, 203 Fed. (2d) 54, referred to above, four of the judges speaking through Clark, J., held that Emspak had not claimed the 5th Amendment as a shield in his refusal to answer, but, conversely, that his refusal to answer was his method of protecting the integrity of that amendment. Other Judges, speaking through Prettyman, Circuit Judge, did not rely upon that interpretation of Emspak's language. They assumed that he had claimed his privilege against incrimination. At page 60, they said:

> "In respect to the applicable requirements upon a witness's refusal to answer a question, we add one further observation in view of the decision and opinion in *Quinn* v. *United States*, 91 U. S. App. D. C. 344, 203 F. 2d 20, decided today. We there remand, we here affirm. But we remand there because the trial court erroneously, we think, held specifically that the defense offered by Quinn was not available to him as a matter of law. Reversal upon that ruling required a new trial. We made further observations designed to be helpful upon the trial thus required. In the present case there was no corresponding ruling of law. There was a general judgment of guilty by the judge without a jury. Our review upon the point is limited to a determination whether the record contains sufficient evidence to support a finding that Emspak deliberately and intentionally refused to answer and thus to support that judgment. We find that it does. The evidence

is ample that Emspak was made well aware that the Subcommittee desired answers to its questions despite the grounds he advanced for refusing. Hence we affirm."

This issue requires an examination of this record to determine what it shows upon the subject of whether it was made clear to each defendant that the Un-American Activities Commission required an answer, notwithstanding the claim of privilege. We will consider the record as to defendant Raley in the first place.

The record shows that in response to a subpoena, Raley appeared with his attorney, who identified himself and proffered and was allowed to file a nine page brief or protest on behalf of defendants Talmadge Raley, Joseph Stern and Renel Stanfield, all members of the United Electrical, Radio and Machine Workers of America, in which the legal existence of the Un-American Activities Commission was challenged and all of its activities declared to be without authority of law and null and void. However, expressly reserving their rights, they consented to testify, but did not waive the privilege to claim exemption from self-incrimination. Raley, having been sworn, took the stand. According to defendants' brief, he was asked about 209 questions. He answered 76 and asserted his privilege of declining to answer 133. For the most part, his examination was conducted by counsel for the Commission. The questions which he answered disclosed that he was a native of Kentucky, had been a resident of Ohio for 31 years, had attended grammer school, and later attended Miller's Business College at night for a short time and received instruction in the technical training school while serving for about two years in the United States Air Force, that he had had various employments, became a member of United Electri-

cal, Radio & Machine Workers' Union, and later became business agent for a local and organizer for the union. It also disclosed that he had been a witness before a Committee of Congress and had at that time exercised his privilege of refusing to answer self-incriminating questions. There is no doubt that he knew and was keenly aware of his rights in that respect. His examination shows he was on guard at all times.

In the first count of the indictment, Raley is charged with refusal to answer the following question:

> "Q. Now, Mr. Raley, as an official of the United Electrical Workers, is there any concern among the officials of the possible presence of Communist Party Members among the leadership of the UE?"

This question was asked by counsel for the Commission and the defendant in response said:

> "A. I must assert the privilege of the Fifth Amendment of the Constitution and Article I, Section 10, of the Ohio Constitution, and refuse to answer."

Neither the chairman nor any other member of the Commission indicated in any way that an answer was insisted upon. Under such circumstances, we cannot say that there is proof that Raley was a contumacious witness in this respect. We hold that the court erred in finding him guilty on this count.

In the second count, Raley is charged with refusal to answer this question: "Now as a matter of fact Victor Decavitch was formerly district president of the UE, was he not?" This question was asked by counsel for the Commission, to which Raley responded by saying: "Again, I have to assert my privilege under the Fifth Amendment to the United States Constitution, and Article I, Section 10

of the Constitution of the State of Ohio." Thereupon, the Chairman of the Commission proceeded to question him concerning the basis of his belief as to how any answer could incriminate him, but the witness claimed the privilege and refused to answer any such questions. Finally, the Chairman of the Commission asked: "You refuse to answer the question?" and Raley responded: "On the basis of my privilege as granted by those documents." This situation suggests two questions—Was the refusal to answer a knowing and deliberate refusal to answer the Chairman and could any conceivable responsive answer have any possible tendency to incriminate the witness? As to the first question, we are of the opinion that the witness understood that the Commission insisted upon an answer, notwithstanding his claim of privilege and that the refusal was deliberate and with full knowledge of the consequences. We are also of the opinion that Raley's knowledge that Decavitch had been district president of UE could have no possible tendency to incriminate Raley. It is not suggested that mere membership in the UE or holding a position or office in it was unlawful. The most that is conceivable is that it might furnish the opportunity for the commission of some crime. For greater reason, mere knowledge that Decavitch had held an office in that organization could have no tendency to prove the commission of any crime by the person having such knowledge. If the claim of privilege should be given such a broad application, it would cease to be a limited privilege from testifying in certain respects and become an absolute and complete exemption from taking the witness stand. Interrogation would be futile.

In 58 Am. Jur., 57 (sections 59 and 60), it is said:

> "Questions as to a witness' presence are deemed merely as preliminary, unless the place mentioned in

the question is a public nuisance, and do not entitle the witness to exercise the privilege of silence. So also, a witness may be required to answer a question whether he saw the commission of a crime, which does not involve his connection with the acts done, or require him to divulge why he saw the crime, if he did see it. It is ruled in some jurisdictions that a party engaged in an unlawful transaction cannot be compelled to disclose the names of others concerned therein, while elsewhere, under similar circumstances, a directly opposite conclusion is reached.

"Statements by a witness concerning a fact which is not a part of a criminal transaction, but is material in a prosecution based on such a transaction, as giving his name, declaring his presence in some locality remote from the scene of crime, or stating whether he was, in fact, a public official at the time it is claimed the offense was committed, do not in themselves constitute incriminating statements tending to show him guilty of crime, although on a prosecution for some offense it may develop that they are material."

We hold that the trial court did not err in finding Raley guilty on this charge.

In the third count, Raley was charged with refusal to answer this question: "Now as a matter of fact that was the headquarters of Local 766 of the UE at that time; isn't that correct?" The record shows that after his refusal to answer this question, asked by the Commission's counsel, on the ground of privilege, the Chairman of the Commission asked him how an answer to that question could possibly tend to incriminate him, and he again refused to answer, asserting his privilege. Thereupon the Chairman said: "I, nevertheless, request an answer." Raley, after consulting his counsel again refused to answer. So it seems to us that his refusal was deliberate and with full knowl-

edge. We are further of the opinion that knowledge of the place where the headquarters were could have no tendency to incriminate. If membership in that union was not a crime, mere knowledge of certain facts concerning its activities could not be regarded as an element of any conceivable crime.

We are of the opinion that the court did not err in finding the defendant guilty on this count of the indictment.

What we have said concerning the first count is equally applicable to the fourth count. There was nothing indicating that the Commission demanded an answer to the question propounded by its counsel. We are, therefore, of the opinion that the Court erred in finding Raley guilty on this count.

In the fifth, sixth, and seventh counts, Raley was charged with refusal to answer whether he knew Herbert Hirschberg, Joseph Sheets, and John Thomas. The record shows that counsel for the Commission asked these questions, and that neither the Chairman nor any member of the Commission indicated in any way that an answer was expected. We, therefore, hold the Court erred in finding Raley guilty on these charges.

In the eighth count, Raley was charged with contempt in refusing to answer this question: "As a matter of fact every one of these individuals are leaders of UE or were leaders of UE at that time, were they not, Mr. Raley?" The individuals referred to were Hirschberg, Sheets, and Thomas. In our opinion the proof was deficient in the same respect as we have found it to be in connection with the fifth, sixth, and seventh counts. For that reason, we find that the Court erred in finding Raley guilty on this count.

By the ninth count, Raley was charged with contempt in refusing to answer this question: "Let me refer to an

article carried in the Cincinnati Post on September 13th, 1949, headed 'Schools Trace Communist Propaganda. Union Agent Denies Kits Are Leftist' and refers to an interview with you. Do you recall that interview?" The record shows that after his refusal to answer, the Chairman of the Commission informed Raley that the Commission expected an answer, and that it was his opinion that there was no valid ground for his refusal. Raley consulted his counsel, who expressed a contrary opinion, which Raley chose to follow. We think this is an instance of a deliberate defiance of the Commission with full knowledge. The questions remains whether any conceivable responsive answer would tend in any way to incriminate the witness. We are of the opinion that it would not.

Refusal to answer questions as to whether he knew Jerome Joseph, Victor Pasche, Herbert Siens, Marie Reed Haug, or Paul Shepherd furnished the basis for the charge of contempt in the tenth, eleventh, twelfth, thirteenth, and fourteenth counts of the indictment.

These questions were asked by a member of the Commission, so that in our opinion the Commission must be considered as expecting and demanding answers thereto. And, for the reasons already stated, we are of the opinion that mere knowing one or more or all of these named men cannot be regarded as having any tendency to incriminate.

For these reasons, we are of the opinion that the court did not err in finding the defendant Raley guilty as charged in those counts.

And for the same reasons, the court is of the opinion that the court did not err in finding the defendant guilty on the fifteenth count, charging him with refusal to answer whether all of the aforesaid persons were not prominent members of the UE in Cleveland, Ohio.

Appendix "B"

In the sixteenth count Raley was charged with contempt in refusing to answer this question propounded by a member of the Commission: "Who has a similar—holds your position in the Cleveland area at the present time with the Union?"

For the reasons already given, we are of the opinion that an answer was required to this question and that the claim of privilege from self-incrimination was no protection.

We, therefore, affirm the judgment against Raley on counts 2, 3, 9, 10, 11, 12, 13, 14, 15 and 16, and reverse the the judgment as to the other counts.

We will now consider the record as it relates to Joseph Stern. He was asked one hundred and five questions and refused to answer sixty. He was indicted for refusal to answer two.

In the first count, he was charged with refusal to answer this question: "Where do you reside, Mr. Stern?" This question was propounded by counsel for the Commission, and after the witness refused to answer the Chairman, at the request of said counsel, ordered the witness to answer. So that unless the claim of privilege is valid, the deliberate refusal to obey the order must be held to be a contempt. The question remains as to whether any reasonable person could conclude that any conceivable responsive answer would tend to incriminate the witness. It is admitted that under ordinary circumstances residence would not be regarded as containing any suggestion of a crime or any element thereof; still it is contended that later questions disclosed that the questioner's purpose eventually was to prove that a Communist meeting was held at the residence of the defendant and that he was present.

We believe counsel fail to distinguish between the elements of crime and opportunity to commit crime. There

is no suggestion that the defendant's residence at a particular place would be an element in any crime with which he might be charged. Even proof of his presence at a particular place would at most be evidence only of opportunity to commit the crime. It should be observed that at that time membership in the Communist Party had not been made a crime.

We are of opinion that the trial court did not err in finding Stern guilty as charged in the first count of the indictment.

In the second count Stern was charged with refusal to answer this question: "I ask you if it is not a fact that Frank Hashmall assigned you to work in the Progressive Party in this county?" This question was asked by counsel for the Commission and there is nothing to indicate that the Commission required an answer.

We, therefore, conclude that the Court erred in finding the defendant guilty on this charge.

Turning now to the charges against the defendant Emmett Calvin Brown, we find that in the first count he is indicted for refusing to answer the following question: "And what has been your educational background?"

The defendant did not invoke the Constitution of the United States or the 10th section of Article I of the Constitution of the State of Ohio as the basis for his refusal to answer this question. The ground of his refusal was: "I just don't think it is your business." He was told by the Chairman that the Commission would decide that question and then proceeded to ask: "Do I understand, for the record, you are refusing to answer the question because you feel it is not our business?" to which the defendant responded: "The answer is the same."

It seems to us that the defendant as a person of average intelligence, which he was, would understand from the

remarks of the Chairman that he approved of the question propounded by counsel for the Commission and expected the defendant to answer it. By not basing his refusal to answer on exemption from self-incrimination, he waived that ground and his right must be judged by the ground assigned by him. As to that ground we hold that it was relevant to the purpose for which the Un-American Activities Commission was created, and, therefore, was not a valid ground for refusal to answer. If the privilege against self-incrimination had been assigned, it would not have availed as a shield. It seems to us that the question is no more than one of the customary questions asked of witnesses for the purpose of developing facts so that the trier of the facts could determine what credibility to attach to his testimony and not for any other purpose. We are of the opinion that the answer was relevant to the investigation which the Un-American Activities Commission was authorized to conduct. Until the general environment and qualifications of the witness had been established there would be no adequate basis upon which to determine the credit to be attached to the witness' testimony.

We find that the court did not err in finding the defendant guilty on this count.

In the second count Brown was charged with contempt in refusing to answer: "Mr. Brown, were you ever employed by the Fisher Body plant at Norwood, Ohio?", and in the third count in refusing to answer: "Is there anything about being employed at that plant which might tend to incriminate you?"

These questions were propounded by the Chairman of the Commission.

We are of the opinion that the answer would have no tendency to incriminate, and therefore, the Court did not err in finding Brown guilty on both of these counts.

Appendix "B"

The fourth count is based on a question of the Chairman of the Commission. He asked: "Were you active in 1947 in the election in the City of Cincinnati in supporting any candidate or any issue on the ballot in that election?" In answer to this question Brown said: "I invoke the privilege of the Fifth Amendment."

We fail to see in what respect the Fifth Amendment in and of itself furnishes any shield to the defendant. The Fifth Amendment is a limitation on the power of the government of the United States alone. We do not stop to consider what of its provisions are incorporated in the Fourteenth Amendment which is a limitation on the power of the States, because we are of the opinion that there is no provision in either the Constitution of the United States or of the State of Ohio that would be applicable to this situation, for the reason that any answer that would be given could disclose nothing other than the right of every citizen to participate in public affairs.

The contention suggests that open political activity is, of itself, something concerning which no inquiry is permitted, and that this sanctity somehow flows from the secret ballot law. There is no doubt that the law insures to the citizen the right to mark his ballot, without molestation, in the secrecy of the voting booth, and that he shall not be questioned concerning how he voted, but it is an entirely different thing to openly engage in political activities outside of the voting booth. There is no more exemption from investigation of that activity than any other.

We find the Court did not err in finding Brown guilty on this count.

It was claimed by the State that the defendants had no occasion to claim the right to refrain from giving incriminating testimony, because of the immunity from prosecu-

tion granted by Section 60, G. C. R. C. § 101.44. It is true that it is enacted by that section that the testimony given before a *committee* of the General Assembly should not be used in any criminal prosecution against the witness and that he could not be prosecuted on account of any transaction or matter concerning which he testifies. We have already indicated that in our opinion that because the members of this Commission were also members of the General Assembly, their terms as members of the Commission expired when their terms in the General Assembly expired. It is also true that the purpose of the Commission was to collect facts to furnish a basis for legislation, and only incidentally were the fruits of its investigation available to the other departments of the government. The authority and power of the Commission was based on a law and not merely on a resolution of the General Assembly. The immunity section (R. C. § 101.44) by its terms is limited to testimony given before a committee or sub-committee of the General Assembly. However, we are of the opinion that the Commission must be regarded as a legislative investigating body, notwithstanding its name and the manner of its creation. We are, therefore, of the opinion that section 101.44 R. C. (G. C. § 60) is applicable to proceedings before the Commission and confers immunity to the limits of the State's power. The fact that the immunity would be no shield from prosecution by other sovereignties, such as, another state or the United States is no valid objection to the operation of the immunity within the sovereignty granting it. 58 Am. Jur. 75.

It is also urged that Sec. 101.44 R. C., must be read in relation to Sec. 101.41, R. C., and that so read the Un-American Activities Commission does not come within its terms inasmuch as it is neither a standing nor a select committee. We do not stop to consider whether it could

be brought within the definition of those terms for the reason that the two sections relate to entirely different matters and section 101.44 contains no such limitation, and, therefore, the terms of one cannot be used to limit the terms of the other.

It is also urged that the defendants were misled by the assurances of the Chairman of the Commission that they had the right to claim the privilege of refusing to give self-incriminatory testimony. We fail to see how the defendants could have been misled by such assurance into surrendering a right, if, as a matter of law, they had no right to surrender.

Without resort to the immunity extended by Section 101.44, R. C., we have found that each of the defendants were properly convicted on one or more counts. However, even assuming the applicability of the immunity statute, the State still had the burden of proving that the refusal to answer was the deliberate act of the defendant, with knowledge of the consequences, in order to give the act the character of contumacy essential to a conviction for contempt.

For these reasons, the conviction of *Talmadge Raley* is affirmed on the SECOND, THIRD, NINTH, TENTH, ELEVENTH, TWELFTH, THIRTEENTH, FOURTEENTH, FIFTEENTH and SIXTEENTH COUNTS, and reversed as to all other counts; as to *Joseph Stern*, the conviction is affirmed as to the FIRST COUNT, and reversed as to all other counts; and, as to *Emmett Calvin Brown*, the conviction is affirmed as to the FIRST, SECOND, THIRD and FOURTH COUNTS.

MATTHEWS, P. J., & HILDEBRANT, J., CONCUR.

ROSS, J., CONCURS IN ALL AFFIRMANCES, BUT DISSENTS FROM ALL REVERSALS.

APPENDIX "C"

PAGE'S OHIO REVISED CODE, TITLE 1, p. 8

Section 101.44 TESTIMONY BEFORE COMMITTEE NOT TO BE USED IN CRIMINAL PROSECUTION OF WITNESS; EXCEPTION.

Except a person who, in writing, requests permission to appear before a committee or subcommittee of the general assembly, or of either house thereof, or who, in writing, waives the rights, privileges, and immunities granted by this section, the testimony of a witness examined before a committee or subcommittee shall not be used as evidence in a criminal proceeding against such witness, nor shall a person be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter, or thing, concerning which he testifies, or produces evidence. This section does not exempt a witness from the penalties for perjury.

APPENDIX "D"

PAGE'S OHIO REVISED CODE, TITLE 1, pp. 19-20

UN-AMERICAN ACTIVITIES COMMISSION

Section 103.31 UN-AMERICAN ACTIVITIES COMMISSION.

There is hereby created an un-American activities commission in the legislative branch of the government, consisting of six members of the senate and six members of the house of representatives, respectively. The president pro tempore of the senate and the speaker of the house of representatives shall be members and shall appoint as members of the commission five additional members in each

house, not more than three of whom shall be members of the same political party. When a vacancy of the membership of the commission occurs it shall be filled in the same manner as the original appointments.

Section 103.32 ORGANIZATION.

The un-American activities commission shall organize by selecting from its membership a chairman, a vice-chairman, and a secretary. The members of the commission shall serve without compensation but shall be reimbursed for their actual and necessary expenses incurred in the discharge of their official duties.

Section 103.33 LEGAL DIRECTOR AND ASSISTANTS.

The un-American activities commission shall employ and fix the compensation of a legal director who shall employ, with the approval of the commission, such assistants, stenographers, and clerks, and engage the services of such professional investigators or technical advisors as the commission deems necessary to carry out the objects and purposes of section 103.34 of the Revised Code.

The salaries and all expenses incurred by the commission shall be paid from the state treasury upon the warrant of the auditor of state by voucher approved by its chairman.

Section 103.34 POWERS AND DUTIES.

The un-American activities commission shall:

(A) Investigate, study, and analyze:

(1) All facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitu-

tional governments by fraud, force, violence, or other unlawful means;

(2) All facts concerning persons, groups, and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government, or the industrial potential of this state;

(3) The operation and effect of the laws of this state, of the several other states, and of the United States, which purport to outlaw and control the activities enumerated in this section and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary;

(B) Maintain a laison with any agency of the federal, state, or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage, or threats of the same.

The commission has such additional rights, duties, and powers as are necessary to enable it fully to exercise those specifically set forth in this section and to accomplish its lawful objectives and purposes.

Section 103.35 POWERS OF CHAIRMAN AS TO WITNESSES.

In the discharge of any duties imposed by sections 103.31 to 103.38, inclusive, of the Revised Code, the chairman of the un-American activities commission may, throughout the state, administer oaths, issue subpoenas compelling the attendance of witnesses and the production

of any papers, books, accounts, records, documents, and testimony, and cause the deposition of witnesses either residing within or without the state. In case of disobedience on the part of any person to comply with a subpoena issued on behalf of the commission or on the refusal of any person or officer to testify to any matters regarding which he may be lawfully interrogated, or to conform to section 2705.02 of the Revised Code, the chairman may be authorized by a majority of the members sitting at the time the alleged offense is committed, to cause a proceeding for contempt to be filed and prosecuted in the court of common pleas of any county under sections 2705.03 to 2705.09, inclusive, of the Revised Code. Each witness appearing before the commission by its order, other than a state official or employee, shall receive such compensation as the commission directs and mileage in the amounts provided by section 2335.08 of the Revised Code. Fees shall be authorized and paid after a notation has been made on the proper voucher sworn to by such witness and approved by the chairman of the commission.

Section 103.36 STUDIES MAY BE REQUIRED TO BE SUBMITTED.

Each officer, board, commission, or department of the state government or of any local government shall make such studies as the un-American activities commission requires within the limitations of its budget and shall furnish the commission all such assistance, information, records, and documents as it requires for the accomplishment of its duties. Reports and recommendations resulting from such studies shall be presented to the commission at least within sixty days prior to the regular session of the 100th General Assembly.

Appendix "D"

The commission may require the services of the bureau of code revision, judicial council, legislative reference bureau, legislative research commission, the Ohio program commission, and such other departments and agencies as it deems necessary to prepare a program of legislation as provided by section 103.34 of the Revised Code.

Section 103.37 MEETINGS; SUBCOMMITTEES.

The un-American activities commission shall meet as often as is necessary to perform its duties, provided that in any event it shall meet at least once each quarter. Five members constitute a quorum, and the majority thereof have authority to act on matters within the jurisdiction of the commission. The commission shall formulate such rules of procedure and policies to be followed in the performance of its duties and functions as it deems necessary and appropriate. The chairman may appoint subcommittees, consisting of not less than three members of the commission, which shall have all the powers conferred upon the commission itself by sections 103.31 to 103.38, inclusive, of the Revised Code, and such specific duties as are assigned to them. A majority of each subcommittee constitutes a quorum. The chairman of any subcommittee has all of the powers conferred upon the chairman of the commission by sections 103.31 to 103.38, inclusive, of the Revised Code.

Section 103.38 REPORTS.

The un-American activities commission shall keep minutes of each meeting or hearing and a record of all testimony and evidence submitted to it. It may make such reports, findings, and recommendations, based upon its investigations and studies, as it deems advisable and necessary, to the people, the members of the One Hundredth

General Assembly, individually, or in any special session thereof, and to the governor. It shall complete its work by and render a final report of its activities and of its recommendations to the One Hundredth General Assembly, the governor, and the attorney general on January 31, 1954, at which time all of its records, books, documents, and other property shall be committed to the attorney general. Any member of the general assembly, the governor, or the attorney general shall have the right to attend any session of the commission, and may present his views on matters which the commission may be considering.

APPENDIX "E"

PAGE'S OHIO REVISED CODE, TITLE 27, p. 57

Section 2705.02 ACTS IN CONTEMPT OF COURT.

A person guilty of any of the following acts may be punished as for a contempt:

(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;

(B) Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions;

(C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required;

(D) The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by him;

(E) A failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of his recognizance.

Appendix "F"

APPENDIX "F"

THE SUPREME COURT OF OHIO

Case No. 34361

THE STATE OF OHIO,

Plaintiff-Appellee,

v.

TALMADGE RALEY, JOSEPH STERN and EMMETT CALVIN BROWN,

Defendants-Appellants.

JOURNAL No. 41, p. 697 Thursday, February 23, 1956
APPEAL FROM THE COURT OF APPEALS OF HAMILTON COUNTY:

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellants it costs herein expended taxed at $.....

ORDERED, That a special mandate be sent to the Court of Common Pleas of Hamilton County, to carry this Judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Hamilton County, "for entry."